

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION

IN RE: KBR, INC., Civil No. RWT-09-md-2083  
BURN PIT LITIGATION Greenbelt, Maryland  
March 10, 2017  
9:00 a.m.

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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE ROGER W. TITUS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: FRED BAKER, ESQUIRE  
JAMES LEDLIE, ESQUIRE  
LISA SALZBERG, ESQUIRE  
ELIZABETH SMITH, ESQUIRE

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United States District Court  
6500 Cherrywood Lane  
Greenbelt, Maryland 20770

Proceedings recorded by mechanical stenography,  
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THE COURT: Ready to proceed?

All right. Before we begin, I just wanted to -- if you notice the bags under my eyes, I wanted to certify to you that I personally read last night the designations of the transcript of Brad Lockhart and you don't need to do anything further in connection with that in support of your case. I would expect you to in your closings to address what's significant or insignificant as the case may be about this transcript, but I want to tell you I did read it. But I'm awake. You may proceed.

MR. LEDLIE: Thank you, Your Honor.

THE COURT: You may proceed.

MR. LEDLIE: Thank you, Your Honor. May it please the court. Ready?

THE COURT: You may proceed.

MR. LEDLIE: Okay. Thank you.

Your Honor, this is a two-day hearing and today is the plaintiffs' day to put on their evidence in support of the case. And as we do that, Your Honor, it is important for us to take a few moments to summarize the evidence that has been presented to date and set in context how we will -- we will not be calling six witnesses -- six live witnesses, Your Honor. We're going to be calling two live witnesses and going through some

1 demonstrative slides summarizing the evidence in the  
2 briefing and the evidence in the case through the page and  
3 line designations. So I just want to do a little bit of  
4 housekeeping first, Your Honor.

5 I believe at the end of the day yesterday,  
6 Mr. Baker moved into evidence the exhibits from our  
7 briefing. But we have provided to the deputy clerk a  
8 exhibit list showing those exhibits and we would ask that  
9 they be formally received into evidence at this time.

10 THE COURT: Do I have physical copies of all of  
11 them?

12 MR. LEDLIE: We have provided the clerk a disc  
13 Your Honor. We have hard copies here as well that we will  
14 provide to the court.

15 THE COURT: We've got large materials with the  
16 briefings. You're talking about additional things beyond  
17 what was in the briefing. Correct?

18 MR. LEDLIE: At this time, Your Honor, we have  
19 the briefing exhibits, the hard copy and we have  
20 everything in the briefing and everything that we will  
21 cover today on a hard drive that we've given to --

22 THE COURT: Was I correct when Mr. Matthews  
23 began when he stated that there had been no additional  
24 submissions with respect to the disputed declarations that  
25 were the subject of the motion that we heard last week

1 that you're not going to rely upon those?

2 MR. LEDLIE: Your Honor, they are in the -- we  
3 did not submit any additional briefing. You heard our  
4 argument, Your Honor, and we believe that because there  
5 has not been any discovery in this case, substantive  
6 discovery on violations, that at this juncture, those  
7 allegations must be accepted as true. However, if your  
8 court needs any question about that in addition to the  
9 other evidence that we'll be putting on with respect to  
10 control and integration that relate to that --

11 THE COURT: Well, what I asked you to do when we  
12 had the conference was that -- the samples of the  
13 declarations that were attached to the moving papers had  
14 serious problems in terms of personal knowledge, in terms  
15 of relevance and so forth and I asked you that if you  
16 wanted to rely upon any particular declaration for  
17 purposes of this hearing, that I would expect you to give  
18 me a submission that would say which affidavit you're  
19 relying upon and what specific paragraphs so I can go  
20 right to the chase and see if there's something there that  
21 would be appropriate for me to consider. You didn't do  
22 that. So I'm assuming you're not relying upon those  
23 declarations for the purposes of this hearing which is on  
24 the pure jurisdictional questions. Is that right?

25 MR. LEDLIE: Your Honor, we understood Your

1 Honor's request. We did not submit any specific  
2 paragraphs. We don't believe that they are relevant, Your  
3 Honor, because we believe that the allegations because  
4 discovery hasn't been permitted on them must be accepted  
5 as true at this time.

6 THE COURT: All right. You may proceed.

7 MR. LEDLIE: Thank you, Your Honor.

8 The two questions which the evidence will  
9 address today, Your Honor, are, of course, control and  
10 integration. And in discussing the evidence, Your Honor,  
11 we need to make sure that the court is -- that based on  
12 some questioning yesterday, we want to make sure the court  
13 is conducting the necessary discriminating analysis as to  
14 the questions at issue. And so, Your Honor, at this time  
15 we will discuss what control -- the evidence that relates  
16 to control which has come up yesterday.

17 The test, Your Honor, the parties have differing  
18 beliefs on what control means in this case or what is  
19 required in order for the parties to successfully assert  
20 the political question doctrine. The case law, Your  
21 Honor, is clear though that it has to be direct and  
22 plenary control and based on the evidence from all the  
23 witnesses yesterday, the independent contractor status of  
24 KBR was scrupulously maintained with respect to waste  
25 disposal. And so we would ask that as Your Honor does

1 consider the evidence throughout today and as you look at  
2 the evidence from yesterday, you consider whether the  
3 control at issue is so pervasive, so overwhelming that  
4 there really was nothing else that KBR could do at any  
5 point with respect to waste disposal because that is the  
6 proper test for this court to consider.

7 similarly with respect to integration, there  
8 will be -- there was testimony yesterday that KBR was  
9 integrated into certain meetings and that their movements  
10 across theater were heavily integrated with the military.  
11 But the operative test, Your Honor, is whether they were  
12 integrated for the specific combatant activity of waste  
13 disposal and water services inside of the bases. That is  
14 the activity at issue and we want to make sure in  
15 considering the evidence that Your Honor is guided by the  
16 case law which says that not only do you need integration,  
17 but the integration needs to be such that the military  
18 chain of command exercises command authority.

19 And you heard testimony yesterday and you'll  
20 hear testimony today, Your Honor, that that test of  
21 integration as to waste disposal, what was actually going  
22 on at the burn pit, you read Mr. Lockhart's deposition,  
23 you'll hear from Mr. Robbins live today, you'll hear from  
24 an ACO, one of these contract officers we've heard so much  
25 about you'll hear from in the form of Augusta Fehn today,

1 Your Honor, and it will be clear to Your Honor that both  
2 the combatant command and the contracting command  
3 understood that KBR employees and KBR as an entity was not  
4 under their command authority, but rather subject to the  
5 contractual controls, the contractual authority that  
6 relate to all government contracts.

7 With that said, Your Honor, we'll move on to the  
8 specific task, the specific combatant activity, as Your  
9 Honor has determined, of waste disposal. But it's  
10 important for Your Honor to understand that there are two  
11 core components to plaintiffs' allegations with respect to  
12 waste disposal. The first is that at many bases, KBR was  
13 never authorized or directed as required by the contract  
14 to operate or use a burn pit at all. But secondly, Your  
15 Honor, and I think what we've not -- Your Honor's  
16 questioning yesterday did not seem to capture is that we  
17 do allege as we always have that if the military did issue  
18 any directive or authorization to KBR, which they did at  
19 certain bases to use burn pits, the question is still were  
20 they directed to burn anything and everything.

21 And General Vines could not have been clearer on  
22 that subject, Your Honor, that HAZMAT materials -- yes,  
23 burn pits he thought were okay. But HAZMAT materials were  
24 not okay. We heard testimony from numerous other  
25 witnesses yesterday concerning the fact that they are

1 prohibited items. So violations are very much a part of  
2 this case, Your Honor, and there's no way that you can  
3 grapple with the Combatant Activities Exception or for  
4 that matter jurisdiction without considering the full  
5 panoply of plaintiffs' claims.

6 In that regard, in our brief, Your Honor, there  
7 are a number of paragraph headings which summarize our  
8 evidence on the operative points at issue here and the  
9 first one that I'd like to go over -- do we have a copy of  
10 the slides?

11 THE COURT: That would help because I haven't  
12 got the best eyesight in the world looking across the  
13 room --

14 MR. LEDLIE: Nor do I.

15 THE COURT: -- and there's a thing over here,  
16 but it's hard to read. That will be great if you give me  
17 the slides. Thank you. Do you have another one by any  
18 chance?

19 MR. LEDLIE: I do, Your Honor.

20 So, Your Honor, when you're looking at the two  
21 questions of whether or not KBR was authorized or directed  
22 to use a burn pit at a base or whether or not they were  
23 authorized and directed to burn everything and anything at  
24 that burn pit, you need to look at how would the  
25 government pursuant to military doctrine tell KBR that

1 they had authority or direction. And it is critically  
2 important to understand that while there was one mission  
3 in -- one global mission in Iraq, Your Honor, that the  
4 military understood and respected a desire and a reality  
5 that contracting functions would be handled through the  
6 contracting command and that operational war fighting  
7 functions would be handled through the operational army or  
8 the war fighting army, Your Honor, and there are very  
9 drastic differences between these two commands and there  
10 are very drastic differences between their authority and  
11 responsibilities with respect to interacting with  
12 contractors.

13 For instance, Your Honor, the operational arm,  
14 this would include everybody from General Vines, General  
15 Sanchez, the base commanders down to the squad level, Your  
16 Honor, are distinct from the contracting arm. We would  
17 cite, Your Honor, to paragraphs 20 and 24 from our brief  
18 where there is additional information to back up this  
19 statement, Your Honor, but it's critically important to  
20 understand that the person using the service, the war  
21 fighter, certainly has an input. They state their  
22 requirement of what they need done, but it's not up to  
23 them. They don't have the authority. They said that they  
24 respected -- every witness that took the stand, KBR and  
25 the military and everyone that you will hear from today

1 says, Your Honor, that the contracting process even in the  
2 time of war, even under fire as much as possible, whenever  
3 possible must be respected.

4 That the war fighter does have a role in the  
5 contracting process, but that once he's stated what he  
6 needs, it's up to the folks on the contracting arm, the  
7 Rock Island and DCMA folks to determine whether or not in  
8 their judgment, that is something that they can convert  
9 into an enforceable contract and what the terms and  
10 conditions the contracting officer in their judgment and  
11 discretion determine are in the government's best  
12 interest. That's the way the military worked even in the  
13 combat arena.

14 For that reason, the operational arm does not  
15 handle contracting issues. We'd cite Your Honor  
16 specifically to paragraphs 20 and 21 of our brief. We'd  
17 also cite Your Honor to General Vines' testimony, General  
18 Sanchez's testimony, Mr. Mayo's testimony, Mr. Singleton's  
19 testimony. Every witness who took the stand said that the  
20 operational arm of the military are not the people that  
21 contract or determine the terms and conditions. And the  
22 terms and conditions of the contract, Your Honor, is what  
23 this case is about as administered in the field by the  
24 contracting arm. It's not that the military doesn't have  
25 the ability to control contractors. It's not that the war

1 fighters don't have the ability to be heard. But at the  
2 end of the day, the United States government has made a  
3 determination that the contracting process shall be  
4 followed on the battlefield for very important reasons  
5 because there's a need for an independence. There's a  
6 need for a person that is aware of how to properly manage  
7 an independent contractor on a military installation and  
8 the people that are the most knowledgeable about that are  
9 the contracting professionals and the contracting arm.  
10 They do get some feedback, Your Honor, from the CORs which  
11 we've heard about. But it's actually the contracting arm  
12 that gives the COR a very limited delegation.

13 For that reason, as we cited in paragraph 23 of  
14 our brief, Your Honor, the operational arm did not manage  
15 the LOGCAP contract. They couldn't modify the terms.  
16 They couldn't put any different performance standards in  
17 there that the contracting arm hadn't already placed in  
18 there. If they needed something done, they had a line of  
19 communication, not a direct command, but they had a line  
20 of communication to the contracting folks and they used  
21 that.

22 We saw -- Mr. Baker, how many contracting  
23 documents -- 600,000 contracting documents, Your Honor.  
24 The contracting process happened. Terms and conditions of  
25 contractors were modified. But when the language says if

1 you're going to use a burn pit, you have to do it at the  
2 direction of the ACO and everybody that took the stand and  
3 everybody that will take the stand and every piece of  
4 evidence will show that that wasn't happening with respect  
5 to burn pits. You have to enforce the contract, Your  
6 Honor, because the operational arm cannot give direction  
7 to contractors as a matter of army policy and procedure.  
8 Paragraphs 2, 27 and 28.

9 The operational arm respected the process and  
10 followed the established contracting channels. Paragraphs  
11 30, 31 and 59, Your Honor, more specifically of our brief  
12 speak directly to this point.

13 So let's talk about the contracting arm, Your  
14 Honor, and the evidence in our brief to this point as well  
15 as Your Honor will be familiar with the evidence that  
16 you've heard. But as I mentioned, you will be hearing  
17 from an actual ACO today, Ms. Augusta Fehn, and I would  
18 ask that Your Honor consider these points when considering  
19 that testimony.

20 The contracting arm is distinct from the  
21 operational army. They are the ones that handle all  
22 contracting issues concerning what a contractor is  
23 required to do in theater with respect to defining the  
24 scope of work, the terms and conditions, the performance  
25 standards, the reference documents that apply. And one of

1 those reference documents that apply, Your Honor -- and  
2 Mr. Baker will go into the contract in greater detail --  
3 is the contractors on the battlefield, which we'll go  
4 through in greater detail, but that's a document which  
5 both the United States military and KBR as an entity  
6 agreed applied to the LOGCAP III contract and agreed to  
7 honor in the process. So we ask that Your Honor also  
8 respect that decision by the United States military to  
9 determine how a contractor can be managed on the  
10 battlefield.

11 Paragraph 21 speaks to how Rock Island and DCMA  
12 will decide what goes in a contract. This includes a  
13 discussion of the fact that there's no doubt that the war  
14 fighter has input. But the ultimate decision, the final  
15 decision, the binding decision can only be executed  
16 through the contracting arm with the rare exception, Your  
17 Honor, of limited force protection efforts because the  
18 contract itself recognized that when it comes to things  
19 like convoy movements in theater, that's not something  
20 that civilian contractors know how to protect themselves  
21 against nor can they under the Geneva Convention. So in  
22 that limited instance, absolutely the military does put  
23 themselves in front, behind and in the middle of KBR and  
24 control them from point A to point B and there's really  
25 nothing KBR can do when they're boxed in on all sides and

1 they're under the direction, the personal and precise  
2 direction of the convoy commander. In that situation,  
3 they are under the direct and plenary control of the  
4 military. But with respect to the contract documents, it  
5 will be clear that within the confines of their work area,  
6 KBR maintained operational control, full operational  
7 control.

8           You've heard the evidence, Your Honor, that the  
9 contracting professionals did not directly supervise KBR's  
10 personnel. They're an independent contractor and they  
11 were managed and controlled consistent with the  
12 contracting framework that applies to all government  
13 contractors. There were some exceptions made for the  
14 military realities in the field without a doubt, Your  
15 Honor. But when it comes to day to day, what was going on  
16 on a base, it's the contracting arm that manages, that  
17 defines and that is in charge of the contractor and they  
18 do so respecting the contractual independence and the  
19 functional independence of the contractor as an entity and  
20 their personnel as not being soldiers and not being in the  
21 military chain of command or command authority.

22           ACOs, any directions they did provide would be  
23 in writing. You heard the testimony on that, Your Honor.  
24 We have additional cites to paragraphs 30 and 31, Your  
25 Honor, of our brief.

1           The contracting process was followed  
2 specifically in the case of the LOGCAP III contract at  
3 issue here, Your Honor. And additional citations and  
4 additional testimony that you heard from the witnesses  
5 yesterday and the ones that you'll hear today which would  
6 include Colonel Coponis, Augusta Fehn will be found in our  
7 brief at -- and for that matter Commander Walsh, who  
8 you'll hear from shortly in terms of a summary board, Your  
9 Honor, but we would refer you to paragraphs 19, 26, 30 and  
10 59.

11           We have two theaters of war, dozens of bases.  
12 To be most efficient with the court's time, we're trying  
13 to go through the evidence so you know when you get back  
14 into chambers and you're asking yourself how do you  
15 conduct the discriminating analysis, where is the best way  
16 for you to go, that's what we're going to be doing today,  
17 Your Honor, is helping walk you through what the evidence  
18 is.

19           And including the fact that contract management,  
20 Your Honor, that's not a political question. There's  
21 discernible standards in a contract. They are written.  
22 They are in writing and they are easily discernible like  
23 any other contract and they are what they are. But what  
24 they're not is an exercise of command authority or direct  
25 supervision of the personnel that you would need in order

1 to invoke the political question doctrine. In support of  
2 that, Your Honor, the entirety of our brief, but in  
3 particular, paragraphs 27 and 29, Your Honor.

4 So I spoke briefly about Colonel Damon Walsh,  
5 Your Honor, and to set him in context briefly, he was the  
6 DCMA commander. The contracting arm, the contracting  
7 command in Iraq from 2003 to 2004. So this was the lead  
8 contract officer in theater for DCMA at the time of  
9 General Sanchez's tenure in theater. He came in I believe  
10 a little bit after General Sanchez in September and stayed  
11 until 2004.

12 And we asked Colonel Walsh, DCMA commander in  
13 Iraq, "is General Sanchez a member of the contracting  
14 force of the army and he said no. We said does he have  
15 the authority to modify a contract and he said no, Your  
16 Honor. Would it be appropriate for General Sanchez to  
17 tell KBR how to technically carry out the term of the  
18 contract? Would that be appropriate? And his answer was  
19 it would be inappropriate for General Sanchez or for any  
20 non-acquisition official to give direct directions to any  
21 contractor. His or her mechanism for doing that is  
22 through the acquisition work force." The contracting  
23 command, Your Honor.

24 And he was further asked by KBR "would I agree  
25 or would I accept that General Sanchez would have

1 authority to direct KBR on doing burn pits? My answer  
2 would be no. General Sanchez didn't have any authority to  
3 direct KBR to do anything." Testimony of Commander Walsh.  
4 And as referenced in the paragraph above, that same logic  
5 applies to any of the operational commanders who are not  
6 part of the acquisitional workforce. Anybody at a base,  
7 any base commander, any mayor cell, they are not part of  
8 the acquisitional work force, Your Honor. They are a  
9 separate command.

10 I mentioned Colonel Walsh because he's one of  
11 the witnesses that KBR has relied upon for the premise  
12 that burn pits were the de facto default mechanism for  
13 KBR. But when you do a discriminating analysis, Your  
14 Honor, this slide will show you that his testimony makes  
15 clear, first of all, he doesn't have any background or  
16 experience. He describes himself as a pig looking at a  
17 wristwatch when it comes to waste management, Your Honor.  
18 Pages 66, 15, 19. Do we have the Walsh testimony?

19 But, Your Honor, we did the slide we handed you.  
20 It breaks down the testimony, Your Honor, into these  
21 concrete points that KBR -- he doesn't recall whether KBR  
22 ever received authorization or instruction to use burn  
23 pits as a default method of waste disposal. He never  
24 discussed the topic of burn pits with KBR management.  
25 He's the DCMA commander. He was involved in all the base

1 planning operations, the statements of work and the ROM  
2 discussions that led up to the contracts being issued. He  
3 said burn pits were not discussed.

4 He agrees that any regulations or limitations on  
5 burn pits included in the contract apply to KBR. He  
6 doesn't know what they specifically were, but he agrees  
7 that if they were in, they're binding.

8 The LOGCAP contract was managed using the same  
9 tools as other government contracts, Your Honor. Pages  
10 46, 47, 48 and 202-203, Your Honor.

11 Battlefield commanders -- that would be the  
12 operational military -- and DCMA commanders don't have  
13 command authority over KBR or its employees. 104 to 106.  
14 107 to 108, Your Honor. That is in and of itself enough  
15 to defeat the Combatant Activities Exception, Your Honor,  
16 because the reality is contractors were independent in  
17 their management and in their organization and in the way  
18 that they were treated by the military. They were  
19 controlled exclusively through the contracting process.

20 Finally, Your Honor, on the issue of assignment  
21 of land, Colonel Walsh did speak to that and he made it  
22 clear that once KBR was assigned land on a base, it was  
23 still expected to do its job in the assigned area and  
24 bring to the command's attention any health hazards posed  
25 by its operations. And he does not recall KBR ever being

1 asked or ever asking to have a burn pit operation moved  
2 and having that request denied. That's in the record,  
3 Your Honor. Pages 111 to 112.

4 He's not the only contracting official that  
5 we've heard from in this case. Mr. James Loerhl, who was  
6 actually at Rock Island, the other contracting command.  
7 Division Chief for LOGCAP III from 2004 to 2009. So we  
8 have to look at timeframes here, Your Honor. And from  
9 2004 to 2009 and then Director of Contracting at Rock  
10 Island again in 2009 and 2010.

11 Mr. Loerhl said -- say -- "let's say, General  
12 Sanchez, he comes along and he actually wants to direct --  
13 issue a direct order to a KBR employee. Is General  
14 Sanchez allowed to do that? No."

15 And General Sanchez explained that he handed his  
16 command down to the military chain of command. Doesn't  
17 even know if KBR was doing any waste disposal at that  
18 time. But why would he not be allowed to do that?  
19 Because he's not a contracting officer. That's the  
20 question that Your Honor needs to be looking at. And he  
21 did not have the authority to change, modify or direct the  
22 contractor in any of those fashions. KBR was not over  
23 there as a direct employee of the army and so we needed to  
24 maintain that independence. And so, no, he was not  
25 allowed to do that.

1           Moreover, General Robert Radin, the commander,  
2           two-star general, Army Sustainment Command, Rock Island,  
3           the contracting authority for the LOGCAP III contract was  
4           asked, "if something isn't included in the terms and  
5           conditions of the contract, can a soldier or officer in  
6           the field" -- can a -- I'm sorry. You can see it, Your  
7           Honor. "Can an officer or soldier in the field supplement  
8           or change that contract? His answer is no. The  
9           contracting command as a matter of military doctrine  
10          policy and chain of command has determined that a  
11          contractor has to be managed by the contracting command  
12          and that their management must be done in keeping with the  
13          independent contractor status. They can be controlled  
14          through contractual means. They can be provided force  
15          protection when necessary. But in terms of their  
16          day-to-day work, the only person that directs a contractor  
17          is the contract document or the contract officer. That's  
18          the law."

19               MR. MATTHEWS: Your Honor, before Mr. Ledlie  
20               goes any further, we would like to interpose an objection.  
21               This sounds to me like a surreply. This is legal  
22               argument. This is citing chapter and verse, page and line  
23               from testimony. Mr. Walsh could have been brought here.  
24               Mr. Loehr could have been brought here. I'm not sure I  
25               understand the value of it.

1           We did agree to interim argument, but we thought  
2           that meant, you know, you're going to summarize evidence  
3           that the court has heard. This is pure additional  
4           argument. It's almost as if Mr. Ledlie himself is  
5           testifying and we would ask the Court to at least set some  
6           limitations on whether this is --

7           THE COURT: He's got the day. He's in charge of  
8           this day. I'll permit him to present to me what amounts  
9           to references to snippets in the record that we're here on  
10          a motions hearing. So I'll permit him to do it. It's  
11          almost like a closing argument. But that's not going to  
12          happen until Monday.

13          And when the day is finished, I want to make  
14          sure I tell counsel I want you to be ready for a pesky  
15          judge in closing argument on Monday because I'm holding  
16          off in asking any questions or challenging any statements  
17          until Monday. But on Monday, it's going to be an oral  
18          argument. I want to ask pesky questions to both sides and  
19          I'll try to give you some idea of areas I'm interested in  
20          that you need to emphasize and address on Monday. But no,  
21          I'll permit him to do this.

22          MR. MATTHEWS: Thank you, Your Honor.

23          THE COURT: The objection is overruled.

24          MR. LEDLIE: Thank you, Your Honor.

25          One of the exhibits to our brief and it was also

1 covered with General Sanchez yesterday was the Contractors  
2 on the Battlefield Field Manual dated January the 3rd,  
3 2003, Your Honor. And because it is a voluminous  
4 document, Your Honor, I have chosen to direct you to some  
5 specific passages that we think are most germane to the  
6 case. The first one is plaintiffs' -- this is Plaintiffs'  
7 Exhibit 6023. And page 5, Your Honor, there's a  
8 description of -- is there a way to get this up on my  
9 screen?

10 It discusses -- and I should preface this by  
11 saying, Your Honor, that this is one of the documents,  
12 reference documents which once again was actually included  
13 as part of the contracting process. It was issued months  
14 before the ground evasion in Iraq and it specifically is  
15 intended to address the use of contractors on the  
16 battlefield as an added resource for the commander.

17 It's important to note that it was -- its  
18 purpose and this is handed out to all military commands  
19 through the chain of command as army doctrine is to define  
20 the role of contractors, describe their relationship to  
21 the combatant commanders -- that's the war fighters, the  
22 operational military -- and the army service component  
23 commanders. That includes the Rock Island division. DCMA  
24 as Your Honor is probably aware by this point is actually  
25 a D.O.D. organization, but they were operating as

1 delegated through Rock Island and present their mission of  
2 augmenting these sources. But this manual was intended as  
3 a guide to both army contracting professionals and  
4 contractors in implementing planning decisions and  
5 understanding how contractors will be managed and  
6 supported by the military forces they augment. That's  
7 significant, Your Honor, because KBR agreed that this was  
8 a reference document that applied in theater.

9           It makes clear that the duties of a contractor  
10 are established solely by the terms of the contract. An  
11 authority over contractors is exercised through the  
12 contracting officer. Page 11.

13           The whole foundation of the duties in this case,  
14 the responsibilities of KBR, are easily discernible. "It  
15 is important to understand that the terms and conditions  
16 of the contract establish the relationship between the  
17 military, U.S. government and the contractor. This  
18 relationship does not extend through the contractor  
19 supervisor to its employees. Only the contractor can  
20 directly supervise its employees.

21           The military chain of command, the operational  
22 military chain of command exercises management control --  
23 well, actually it's any military command. The military  
24 command chain of command exercises management control  
25 through the contract." That's what it says.

1           And when it comes to the terms and conditions of  
2     the contract, it's made clear that "the contractor is  
3     expected to be self-sufficient, handling all actions  
4     necessary to perform under the terms and conditions of the  
5     contract without significant assistance from the  
6     government." This was not a situation of the military  
7     commingling assets in burn pits or at water stations, Your  
8     Honor. KBR had those contractual obligations. They were  
9     the ones that were required under the contract to perform  
10    those functions.

11           "Management of contractor activities is  
12    accomplished through the responsible contracting  
13    organization and not the chain of command." Got to do it  
14    through the contracting arm, not the military operational  
15    chain of command.

16           "Commanders do not have direct control over  
17    contractors or their employees." Tests for political  
18    question, direct control, commanders don't have that.  
19    Only the contractors manage, supervise and give directions  
20    to their employees.

21           "Commanders must manage contractors through the  
22    contracting officer or ACO," Your Honor. That's because  
23    as 5.8 states "the contractor's responsibility regarding  
24    support provided by the government is to ensure that it  
25    complies with the terms and conditions of the contract

1 concerning government provided support.

2 The role and responsibilities of the COR, the  
3 contract officer representative, are a matter of military  
4 doctrine and policy. They are laid out on page 14 of this  
5 exhibit, Your Honor, which states that "it should be noted  
6 that the COR represents the contracting officer only to  
7 the extent delegated in the written appointment," Your  
8 Honor. It's not an unlimited obligation. And he does not  
9 have the authority to change the terms and conditions of  
10 the contract. Only a PCO or ACO if appointed may make  
11 changes to an existing contract. This point is driven  
12 home on the following page that says that "the contracting  
13 officer, not the COR is the only government official with  
14 the authority to direct the contractor or modify the  
15 contract."

16 Lastly, in Appendix A on page 91, we direct Your  
17 Honor specifically to paragraph A(3). It makes clear that  
18 "although a COR provides a vital link between the military  
19 operational" -- is what they're discussing there -- "and  
20 the contractor, there are certain limits to his authority.  
21 A COR is prohibited from making any commitments or changes  
22 that affect the price, quality, quantity, delivery or  
23 other terms and conditions of the contract." That's army  
24 policy. Military decision set forth.

25 Interfering with the contractor's management

1 prerogative by supervising contractor employees or  
2 otherwise directing their work efforts is something that a  
3 COR is not authorized to do. He doesn't have the  
4 authority. He's not supposed to do it. There's not  
5 evidence that they were doing it.

6 It wasn't only the military that understood this  
7 fact, Your Honor. Mary Wade, senior contract manager for  
8 the LOGCAP III contract. The highest person at KBR when  
9 it came to that function was asked the question, "and so  
10 regardless of what a mayor cell may want on the military  
11 side, they had to get it through the contract process at  
12 Rock Island?" And her answer was yes.

13 The operational military can ask, but what they  
14 get is defined by the contract officer in the terms and  
15 conditions of the contract. If they need to modify it,  
16 they need to go back to the contract officer and get  
17 modifications. Certainly, in the theater of war, you can  
18 get verbal direction, but it would always be followed up  
19 in writing, especially when something is fundamental as  
20 the basic way in which waste is going to be managed at a  
21 given base on a day-to-day basis.

22 I will at this point let Mr. Baker walk you  
23 through what these terms and conditions of the contract  
24 that we've been discussing actually say.

25 MR. BAKER: May it please the court. Fred Baker

1 for the plaintiffs. First, I will hand up some excerpts  
2 of the contracts that I'm going to be discussing. These  
3 are cited in our brief and part of the items that Mr.  
4 Ledlie moved in earlier this morning. But rather than  
5 giving Your Honor six inches of paper, I've tried to boil  
6 it down to the ones that I'm actually going to talk about.

7 THE COURT: God bless you.

8 MR. BAKER: So the first document we're going to  
9 be looking at is Exhibit 1070 and this is the umbrella  
10 LOGCAP contract. If we could first turn to Section 1.11.  
11 This is a cor provision of the umbrella contract that  
12 applies across the board throughout the entire LOGCAP III  
13 process and here's what it says. "The relationship of the  
14 contractor and the U.S. Army shall at all times be that of  
15 independent contractor. The contractor shall have  
16 exclusive supervisory authority and responsibility over  
17 employees. The government shall manage the contract, but  
18 will not exert control or supervision over contractor  
19 employees."

20 So as Your Honor looks at the political question  
21 doctrine and the plenary control, the direct control, this  
22 is a very informative paragraph that overhangs the entire  
23 analysis. What is also significant, Your Honor -- and I  
24 mentioned this briefly in my opening statement -- if you  
25 look back at the Taylor case, you'll see that the Taylor

1 court relied on this paragraph as one of the basis for not  
2 finding the first Taylor factor having been satisfied. So  
3 we think it's a very significant paragraph that should be  
4 considered.

5 If we could go next to paragraph 1.14? Now  
6 we've discussed about the issue of quality control. KBR  
7 was the initial entity that was responsible for ensuring  
8 that its performance complied with the terms of the  
9 contract. It says "the contractor will be responsible for  
10 the quality, technical, logistical and financial accuracy  
11 and the coordination of all aspects of performance."

12 Let's look at 1.16.1. Here we have one of the  
13 umbrella performance standards that is in the contract and  
14 it says "any contractor personnel working on this contract  
15 are required to adhere to sound environmental practices  
16 and all applicable environmental protection and  
17 enhancement laws and regulations. Environment protection  
18 matters shall be coordinated with the PCO or designated  
19 representative and commander responsible for the AO, area  
20 of operation."

21 So those were the high points that I think of  
22 the umbrella contract that I wanted to touch upon.

23 If next, we could go to the first task order  
24 that I'm going to discuss, which is Task Order 59 and  
25 that's Exhibit 1102. Try to walk through this. If first

1 we could go to -- and I touched on some of this briefly  
2 yesterday. So I'm not going to dwell on it too much. But  
3 if we could first go to Section 8.9? And here's the  
4 tasking. Here's what the government tasks KBR with and  
5 this is from 2004. Like I said, Your Honor, there are  
6 many of these task orders. We've attached them to our  
7 brief. I don't have time to go obviously through all 50  
8 or 60 that we have. But this will give you a sampling I  
9 believe.

10 This paragraph has no reference to using a burn  
11 pit. It simply says in general terms handle the waste for  
12 us. Engage in waste management and disposal. It  
13 certainly has if you read through towards the bottom, it  
14 says "the contractor is responsible for collecting,  
15 storing HAZMAT, HAZ waste generated by internal operations  
16 and utilizing DRMS to transport and dispose." So  
17 obviously, those aren't considered to be burnable items,  
18 it says treat these separately and the military units are  
19 responsible for establishing their own hazardous waste  
20 storage areas.

21 If we could next look at 8.9.1? In this  
22 paragraph, it says "the contractor shall incinerate using  
23 a contractor-acquired incinerator all solid wastes to  
24 include medical wastes, but including recyclables. So  
25 here we have the concept very early on in the process of

1 recycling as well as incineration. And the contractor --  
2 that next line I don't need.

3 If next, we could go to Section 1.1. So again  
4 here is the overarching principle that applies to waste  
5 management by KBR. "Notwithstanding any other provisions  
6 of this SOW, statement of work, the contractor shall  
7 comply with all U.S. laws." And, of course, one of the  
8 U.S. laws that we've pointed out to Your Honor is RCRA and  
9 RCRA does not allow for surface burning.

10 And again we pointed out yesterday "in the case  
11 of inconsistencies, the contractor shall contact the  
12 administrative contracting officer, identify the  
13 inconsistency and seek guidance." So if there's a problem  
14 and the contractor says I can't meet this term, there's a  
15 mechanism for dealing with that. It's to go to the ACO  
16 and get a directive.

17 Next if we could look at paragraph 1.5. And 1.5  
18 says that "the contractor shall adhere to the OEBGD unless  
19 otherwise directed by the ACO." The OEBGD -- and I'm not  
20 going to put it up here today, but yesterday we went  
21 through it -- it underscores that "surface burning is not  
22 to be used as the regular method of solid waste disposal."  
23 So it underscores that earlier paragraph that says you  
24 must comply with all U.S. laws. Those are the points that  
25 I wanted to make on Task Order 59. Let's next turn to

1 Task Order -- I'm sorry.

2 Let's go to another provision in Task Order 59,  
3 which is 1.2. While she's pulling it up, I can simply  
4 read it to Your Honor. It's again another performance  
5 standard. And it says "the contractor shall be  
6 responsible for the safety of employees and base camp  
7 residents during all operations in accordance with the  
8 army and OSHA safety regulations and guidance." So  
9 there's another performance standard that even if they  
10 were allowed, assuming arguendo that they were allowed to  
11 use a burn pit, they were still responsible under a  
12 performance standard to be responsible for the safety of  
13 base camp residents.

14 This again is a very significant paragraph and  
15 it applies in multiple task orders and this is the second  
16 paragraph that the Taylor court relied upon in finding  
17 that the first Taylor factor had not been found for the  
18 purposes of a political question doctrine analysis. So  
19 again we'd ask Your Honor to focus in on this paragraph as  
20 well when it considers that and look back at Taylor.

21 The next paragraph I'd like to look at in this  
22 document is 1.4. This is a familiar theme, but I'd like  
23 to highlight it. "Unless otherwise specified in the  
24 statement of work, all increases, decreases or  
25 modifications to requirements specified in this SOW are

1 directed by the ACO." Again, here we have the ACO being  
2 the person who can make the changes to the contract terms.

3 We heard from witnesses yesterday on a repeated  
4 basis that changes have to be in writing. So we've looked  
5 through these 600,000 documents that KBR told us about in  
6 its opening that were contract directives were other  
7 writings from the ACOs directing KBR to use a burn pit.

8 If we could go next to 6.0 of this document?  
9 And here I'd like to draw Your Honor's attention to the  
10 next to the last line where it says "the contractor shall  
11 have exclusive supervisory authority and responsibility  
12 over employees." Again, this is very relevant for the  
13 political question doctrine analysis and the Combatant  
14 Activities Exception preemption analysis states that they  
15 have -- this is not the language that you'd find if you  
16 were looking for plenary control, Your Honor.

17 Finally, let's look at 1.9 and as Mr. Ledlie  
18 mentioned earlier, there is a provision regarding  
19 contractor force protection and that is the sole area that  
20 is reserved back to the government. And I haven't cited  
21 it in the materials here that I gave Your Honor, but as  
22 you look through the fuller document, if you look at  
23 Section 2.7, that is the provision that integrates as a  
24 reference document the contractors on the battlefield, a  
25 document that Mr. Ledlie just described to you.

1                   Now we can turn to Task Order 89. And the  
2                   first, section I'd like to highlight for Your Honor is  
3                   Section 8.9. This, by the way, Your Honor is not a task  
4                   order that we went through yesterday. So again here's the  
5                   tasking on waste management disposal and it speaks in  
6                   similar terms as the previous document that we looked at  
7                   except if you look down to paragraph 8.9.1. and here it  
8                   says again "the contractor shall incinerate using a  
9                   contractor-acquired incinerator all solid waste to include  
10                  medical waste." And here's the part that pertains to burn  
11                  pits. "As a last resort and as specified by the ACO" --  
12                  again we have directive by the ACO -- "the contractor  
13                  shall operate burn pits while minimizing their  
14                  environmental effects on the base camp."

15                 So first of all, to underscore it again, they  
16                 can only use a burn pit if it's specified by the ACO. We  
17                 haven't seen those documents. There's 600,000 contractual  
18                 documents out there. We just don't see them in there.  
19                 And "the contractor shall operate the burn pits while  
20                 minimizing their environmental effects on the base camp."  
21                 So there's a performance standard written into the  
22                 contract as well.

23                 Next if we could look at -- and of course, it's  
24                 as a last resort. If we could look at 8.9.2? Again, part  
25                 of our claim is that even in those instances where KBR

1 might have been authorized to use a burn pit, they were  
2 not authorized to burn anything and everything in it and  
3 this simply underscores that point. It says "this task  
4 order is not intended for the disposal of hazardous waste.  
5 If hazardous waste is discovered mixed with any scrap  
6 item, it shall be removed and disposed of under  
7 appropriate DRMS contract." And so not only do we have  
8 from this paragraph, the take-away is that hazardous waste  
9 certainly should not be included in any burn pit if it  
10 were allowed. The second take-away is is that there's the  
11 concept of sorting introduced into the contract, another  
12 performance standard.

13 And indeed if you look at 8.9.2.2, "the  
14 contractor is responsible for operating and maintaining a  
15 hazardous waste storage area to collect and store" -- not  
16 burn -- "HAZMAT, HAZ waste generated by internal and  
17 military operations."

18 Next if we could go to paragraph 1.1? The  
19 language is a little bit different, but it's the same  
20 concept. "Except as otherwise provided, the contractor  
21 shall comply with all host nation, local laws and again  
22 U.S. laws." All U.S. laws it's required to comply with.  
23 And again we have the same language or very similar  
24 language regarding inconsistencies. If there's a problem,  
25 go to the ACO and get directive. Again, however, we

1 haven't seen those directives.

2 If we could go to paragraph 1.4?

3 THE COURT: Counsel, I don't have that page you  
4 just referred to. Oh, yes, I do. It's in the end. Okay.  
5 It's out of order. Okay. I got it. Thank you.

6 MR. BAKER: So 1.4 incorporates both the -- I'll  
7 read it. "The contractor shall adhere to the overseas  
8 environmental baseline guidance document, the OEBDG, and  
9 MNC-I Environmental Standard Operating Procedure (SOP) in  
10 the performance of this SOW." Again we've gone through  
11 the OEBGD. It says that surface burning is not to be the  
12 regular method of disposal. We looked a little bit at the  
13 MNC-I. I'm going to look at it in greater detail now  
14 because this really goes to some very important points on  
15 the performance standards.

16 So next, if we could turn to the MNC-I, which is  
17 Exhibit 2028? And hopefully, Your Honor, that's the next  
18 item in your --

19 THE COURT: That is.

20 MR. BAKER: So first, let's look at Section  
21 B(2). Okay. It says down here in B(2), "Burn pits are  
22 strongly discouraged because it can generate potentially  
23 toxic air emissions, can result in fire hazards and should  
24 only be authorized as a last resort by the base camp  
25 commander." And of course, this document was written for

1 the military. But when it is incorporated into contracts,  
2 then you go and look at the ACO for that last resort  
3 language. Even so, even if KBR were to argue that's the  
4 base camp commander, we haven't seen those documents  
5 either from the base camp commander saying go forth and  
6 use a burn pit.

7 And then there's another performance standard in  
8 here, "tires are usually recycled through the military's  
9 direct exchange program and should not be burned." So  
10 again tires can't be burned.

11 Next, if we could look at section -- the scope  
12 section on page 74. Okay. So here is where the SOP not  
13 only because of the task order, but by the SOP's own  
14 application makes it applicable to contractors. It says  
15 "this SOP is applicable to all military units and  
16 contractor operations related to burn pits or burning of  
17 wastes with the exception of incinerator use. All MNC-I  
18 units will ensure this SOP is incorporated by reference  
19 into all contracts calling for any type of burning of  
20 wastes."

21 So if we look then down to section 5.0(a) and  
22 again I'm going to quickly run through a number of the  
23 performance standards for -- if you were in fact allowed  
24 to use a burn pit, there's lots of performance standards  
25 with which you must comply. One is that you have to

1 control the access. You have to have a chain or a gate  
2 capable of being locked and it will be used to control  
3 access to the burn pit.

4 Next, if we could look at 5.1(a). A list of all  
5 prohibited items must be posted as well. This paragraph  
6 is key, Your Honor. I read through it yesterday and I  
7 want to reemphasize it today. So even where you're  
8 allowed to use a burn pit, there's very, very severe  
9 limitations on what you can burn under the MNC-I. "Only  
10 wood, wooden products and paper, paper products, or  
11 canvas, i.e., uniforms will be accepted." If you want to  
12 try to burn anything else in that burn pit, you need  
13 written permission. "Requests for incineration of any  
14 other type of material must be approved by the Garrison  
15 DPW or the FOB ECO. Approval must be in writing." Again  
16 when you translate this into the contractual term, you  
17 look to the ACO.

18 So then let's look down at 5.1(b). Organics  
19 can't be burned. Okay. It says that "there shall be a  
20 separate designated area within the dump for organic  
21 biodegradable decomposing food waste from dining  
22 facilities."

23 If we could look at paragraph 5.1(c). This  
24 paragraph tells us that "rubber, scrap metal and usable  
25 wood should not be burned. They should be dropped off for

1 re-use and recycling."

2 Paragraph 5.1(d). This paragraph highlights  
3 that hazardous waste, POL, which is petroleum, oil and  
4 lubricants, should be separately dealt with. Not in the  
5 burn pit.

6 Next if we could look at 5.2(b)? So here again  
7 another performance standard with which a burn pit  
8 operator must comply, which is "burning operations will be  
9 supervised by authorized until supervision decides there's  
10 no potential danger and there's guidelines. You have to  
11 make sure the weather conditions are stable and the flames  
12 can't be higher than two feet."

13 And then let's turn to Section 5.3(b). So again  
14 we have prohibited items. And again we've looked at the  
15 earlier section, which is 5.1(a) and that says you can  
16 only burn wood, paper and canvas. Prohibited items we  
17 believe are items that can never be burned even with ACO  
18 directives. So that would be propane cylinders, fuel  
19 cans, aerosol cans, paints, fuel oils, chemicals.

20 And if you'd go to the next page, please?  
21 Ammunition, explosives, combustibles, medical waste,  
22 metal, batteries, tires, lubricants, appliances,  
23 electronics, any other hazardous material, coolant, any  
24 hazardous waste, any serviceable military items. These  
25 are prohibited items. Can't be burned. Ever.

1                   So again these performance standards are very  
2                   important in considering particularly the second prong of  
3                   the plaintiffs' claim.

4                   If we could turn back to the Task Order 89  
5                   again? And if we go to paragraph 1.2, please? Again here  
6                   we have the work site safety paragraph. And again this is  
7                   the paragraph upon which the Taylor court relied in  
8                   finding that the Taylor prong 1 had not been satisfied.  
9                   So here we have it again.

10                  If we look then at Section 1.3? And here we  
11                  have all the direction. "Unless otherwise specified in  
12                  this SOW, all increases, decreases or modifications to  
13                  requirements specified in this SOW are at the direction of  
14                  the PCO ACO. It's where the directives come from.

15                  Next if we could turn to Section 6.0? The  
16                  language will start becoming familiar to Your Honor  
17                  because it appears in virtually all these task orders.  
18                  "The contractor shall have exclusive supervisory authority  
19                  and responsibility over employees." The language of  
20                  plenary control.

21                  If we could go to paragraph 1.7? Again, here is  
22                  the familiar contractor force protection reservation for  
23                  convoys and that sort of thing. And then also in this  
24                  document and I haven't cited it to Your Honor in the  
25                  papers that you have, but paragraph 2.7 contains the

1 reference document that Mr. Ledlie spoke about,  
2 contractors on the battlefield. That's incorporated into  
3 this. So those are my comments on paragraph or Task Order  
4 89. That's what I would like to highlight there.

5 If we could now turn to Task Order 139? And I  
6 did run this very briefly with Your Honor yesterday. So  
7 I'll try to be a little bit faster on this one.

8 Again, paragraph 8.8. 8.8 is the tasking  
9 paragraph. And again it tasks KBR with handling  
10 non-hazardous solid waste, management and disposal. And  
11 again let's emphasize non-hazardous solid waste. It  
12 doesn't include hazardous waste for purposes of this  
13 paragraph. And it says at the end, that "the contractor  
14 shall conduct non-hazardous solid waste management  
15 activities in accordance with the order of precedence as  
16 listed below." So let's look at the order of precedence  
17 and you will see that the fourth and final least preferred  
18 method is solid waste or is surface burning.

19 If we could go to that paragraph? So we have  
20 the order of precedence and surface burning is included in  
21 there. Again though it says "surface burning in  
22 coordination with the LSO" and familiar language "at the  
23 direction of the ACO." And we've heard people say time  
24 and time again, these witnesses, it would have to be in  
25 writing. "The contractor shall provide new or operate

1 uncontaminated existing burn site while minimizing the  
2 environmental effects on the base camp." So there's a  
3 performance standard embedded in there, too. Minimizing  
4 environmental effects on the base camp. "The contractor  
5 shall ensure that products of combustion are reduced to  
6 become ash and non-combustible components." And then here  
7 we have another performance standard. "The contractor  
8 shall minimize any type of smoke exposures to the camp  
9 population." Discernible standard does not raise a  
10 political question.

11 If we could then go to that chart that you just  
12 showed, Ms. Veldman? And again just to show the  
13 nomenclature that they're using. They call them  
14 performance objectives and performance standards. That's  
15 why I'm calling them performance standards. And again you  
16 have the language that you saw above. And you have  
17 reference here to the MNC-I guidance.

18 So let's then look back at section 1.1.1. And  
19 here is reference again to the OEBDG, which we've gone  
20 through many times, and the contractor shall adhere to the  
21 MNC-I, Environmental Standard Operating Procedure, the  
22 document we just went through.

23 Next if we were to look at section 1.1.2, the  
24 worksite safety paragraph, the Taylor language. Let's  
25 then look at 1.1.3. Inconsistencies. "In the case of

1 inconsistencies" -- that is if the contractor believes it  
2 can't comply -- "the contractor shall contact the  
3 administrative contracting officer, identify the  
4 inconsistency and seek guidance."

5 Next, if we could look at 1.2? Contractor  
6 Direction. "All increases, decreases or modification to  
7 requirements specified in this SOW are at the written  
8 direction of the ACO in coordination with the procuring  
9 contracting officer. The PCO. Again it has to be in  
10 writing.

11 1.9, please. So again if you look at the last  
12 sentence of that paragraph? "The contractor shall  
13 maintain supervisory control over all contractor employees  
14 and ensure its subcontractors maintain supervisory control  
15 over its subcontract employees." Familiar language.  
16 Again very relevant to the plenary control inquiry.

17 Let's look at Section 1.10. Another paragraph  
18 that's very, very relevant to the plenary control and  
19 Combat Activities Exception preemption analysis.

20 "Operational Control (OPCON) is the context of this SOW --  
21 in the context of this SOW is defined as the contractor  
22 being fully responsible for performing the function,  
23 service or capability specified by the government. The  
24 contractor shall report performance outcomes to the  
25 responsible or accountable government official in charge.

1 The contractor shall maintain supervisory control over all  
2 contractor employees." That's paragraph 1.10.

3 Let's look at paragraph 6.0. We focus in on the  
4 last line here. Again underscores the independence of the  
5 contractor. "The contractor shall have exclusive  
6 supervisory authority and responsibility over employees."

7 Finally, paragraph 1.5. And here, we have the  
8 familiar force protection language that talks about  
9 convoys and that sort of thing, reserving that to the  
10 government.

11 So that was my walk-thru, Your Honor, of the  
12 contracts and I hope this helps you navigate these as you  
13 go back in chambers and you have to pinpoint the points  
14 where we believe --

15 THE COURT: No. It's very helpful. It's  
16 exciting as paint drying, but it's easier for me to find  
17 it when you walk me through it this way.

18 MR. BAKER: Thank you, Your Honor.

19 THE COURT: So I appreciate it.

20 MR. LEDLIE: And, Your Honor, while the  
21 contracts are fresh in your mind, I would like to go  
22 through the General Petraeus letter. So the first one,  
23 Your Honor, we'll go through -- I want to make sure that  
24 we have the right one here -- is the --

25 THE COURT: Now what are you reading from now?

1           MR. LEDLIE: This is the 4th of December 2008  
2 letter from General David Petraeus, Your Honor.

3           THE COURT: Okay. Do you have copies of that?

4           MR. LEDLIE: Yes, Your Honor. Exhibit 122 to  
5 our -- it's defendant's brief. 122.

6           Your Honor, the first thing I'd like to note is  
7 the date, which is significant. It is a document from  
8 2008 in which General Petraeus is commenting on a recent  
9 letter from Russell Feingold "regarding the possible  
10 exposure of service members and the local population to  
11 hazardous waste in Iraq and Afghanistan. The health of  
12 our personnel and environmental management of our forward  
13 deployed locations is one of my top priorities."

14           And the next section is the one that Your Honor  
15 is familiar with because the defendants have frequently  
16 cited which is "there is and will continue to be a need  
17 for burn pits during contingency operations." But it  
18 doesn't stop there. "To this extent, much effort has gone  
19 into locating/relocating pits in remote areas of the  
20 operating bases to minimize exposures, training personnel  
21 on proper operation and developing and circulating  
22 operating procedures and assessing burn pit operations to  
23 include corrective action." And I think in context he's  
24 discussing military-run burn pits, Your Honor. But it's  
25 significant that whether it's a military burn pit or a

1 contractor-run burn pit, there is clear army direction  
2 that you don't just do anything there. You need to  
3 consider location. More importantly, you need to follow  
4 the operating procedures set down. And so Mr. Baker has  
5 just gone through the contractual operating procedures  
6 that apply and this letter needs to be considered in that  
7 context.

8 More directly and this is discussing KBR's waste  
9 management responsibilities and this is a letter -- this  
10 is Plaintiffs' Exhibit 5182, the letter from James Loehr1  
11 of the -- executive director of Rock Island. I showed you  
12 his deposition testimony earlier. And the first thing is  
13 the date is not the most legible copy, but it clearly says  
14 April of 2010, Your Honor. So when you're placing this  
15 letter, place it in the context of when it was written.

16 And Mr. Loehr1 does state a number of things.  
17 But at the end, he says "the army believes that operating  
18 the burn pits in accordance with the contractual  
19 requirements, USFI SOPs and the CENTCOM guidance is an  
20 acceptable means of waste disposal in a contingency  
21 environment and should continue." But that operation,  
22 Your Honor, is specifically premised on the condition that  
23 it will be in accordance with the contractual  
24 requirements, SOPs and other guidance. "Accordingly, you  
25 are to continue operating the burn pits in accordance with

1 the contract." 2010, the contract still matters as well  
2 as existing CENTCOM and USFI guidance.

3 Our next piece of evidence, Your Honor, will be  
4 Mr. Robbins, a live witness. Would it be a good time for  
5 a break before we do that or --

6 THE COURT: No. Let's take a break until 20  
7 minutes of 11 and then you can put your first witness on.

8 MR. LEDLIE: Thank you, Your Honor.

9 THE COURT: Thank you.

10 (Recess.)

11 MR. MATTHEWS: Your Honor, if I may before  
12 plaintiffs resume?

13 THE COURT: Yes.

14 MR. MATTHEWS: I just want to say for the record  
15 that there is so much that just came out from the  
16 testimony from counsel, we just want to inform the court  
17 it's our intention to provide a thoughtful and thorough  
18 response in the closing consistent with whatever direction  
19 the court gives us at the end of the day.

20 THE COURT: You may.

21 MR. MATTHEWS: Thank you.

22 THE COURT: All right. Who is your first  
23 witness?

24 MS. SMITH: Thank you, Your Honor. The  
25 plaintiffs would like to call Kevin Robbins.

1 THE CLERK: Sir, please come forward. Please  
2 raise your right hand.

3 Thereupon,

4 KEVIN ROBBINS,  
5 Having been called as a witness on behalf of the  
6 plaintiffs and having been first duly sworn by the Deputy  
7 Clerk, was examined and testified as follows:

8 THE CLERK: Please have a seat on the witness  
9 stand. Sir, please speak directly into the microphone.  
10 State your name. Please spell your first and last name.

11 THE WITNESS: Kevin, K-E-V-I-N. Robbins,  
12 R-O-B-B-I-N-S.

13 DIRECT EXAMINATION

14 BY MS. SMITH:

15 Q Good morning, Mr. Robbins.

16 A Good morning.

17 Q Mr. Robbins, are you a plaintiff in this case?

18 A Yes, I am.

19 Q And are you a former KBR employee?

20 A Yes, I am.

21 Q Mr. Robbins, when did you first become employed  
22 with KBR?

23 A Best I can remember, late February, early March  
24 of '05.

25 Q And what led you to join KBR?

1           A     My youngest brother was killed with the initial  
2     invasion in April of '03 and it weighed on me.  So -- I  
3     was too old to join.  I'm prior military and I was too old  
4     to joined.  So I contacted KBR via the Internet.

5           Q     And you started working for them you said in  
6     late February or March of 2005?

7           A     Yes.

8           Q     And how long did you work for KBR?

9           A     Approximately 25 months.

10          Q     When you first started working for KBR, what  
11     base were you working at?

12          A     Al Kut.

13          Q     Is that Delta?

14          A     Camp Delta.  Yes.  I'm sorry.

15          Q     And what was your job title at Camp Delta when  
16     you arrived?

17          A     Labor foreman.

18          Q     And what were you asked to do in that capacity  
19     as labor foreman?

20          A     To run the burn pit.

21          Q     How long did you run the burn pit at Camp Delta?

22          A     Approximately 90 days.

23          Q     Prior to your employment with KBR, had you had  
24     any experience with respect to waste management?

25          A     None.

1           Q     What were you doing when you applied for the job  
2     at KBR?

3           A     I was an independent drywall contractor.

4           Q     And did KBR provide you with any training  
5     related to waste management before you started running the  
6     burn pit?

7           A     No.

8           Q     Did you have some sort of training before you  
9     left?

10          A     I had two weeks of training in Houston in  
11     chemical warfare and about a hour, hour and a half of OSHA  
12     regulations.

13          Q     And were you informed that the OSHA regulations  
14     were regulations that would apply when you were working  
15     for KBR --

16          A     Yes.

17          Q     -- in Iraq? When you were tasked with running  
18     the burn pit, were you given any documents or instructions  
19     about how to run the burn pit?

20          A     When I got there, when I asked questions, they  
21     said that there was a document inside the burn pit hut?

22          Q     And was there in fact a document inside the burn  
23     pit hut?

24          A     There was.

25          Q     And what did that document say?

1           A     Not to burn unspent ammunition and look for  
2 explosives.

3           Q     Were you given a list of prohibited items?

4           A     I was not.

5           Q     Did the military provide you with any training  
6 with regard to the operation of the burn pit?

7           A     No.

8           Q     And did DCMA provide you with any training with  
9 regard to the operation of the burn pit?

10          A     No.

11          Q     Who is your direct supervisor when you were  
12 running the burn pit?

13          A     I had a general labor foreman. I cannot  
14 pronounce his name.

15          Q     And he was the KBR general foreman?

16          A     Yes.

17          Q     And who was his boss?

18          A     David Fulgram, our assistant camp manager.

19          Q     KBR as well?

20          A     Yes.

21          Q     And then who was -- had the ultimate -- the  
22 highest position I guess you could say there at Camp Delta  
23 for KBR?

24          A     That would be our camp manager, Forest Cat  
25 Early.

1 Q Did you report to anyone from the military?

2 A No, I did not.

3 Q Did you report to anyone from DCMA?

4 A Excuse me?

5 Q Did you report to anyone from DCMA?

6 A No, I did not.

7 Q Aside from yourself, were there other  
8 individuals who were working in the burn pit with you?

9 A I had six host country nationals.

10 Q And did they report to you?

11 A Yes.

12 Q And aside from those six host country nationals,  
13 were there any other KBR employees or subcontractors that  
14 worked in waste disposal or the burn pit operations at  
15 Camp Delta?

16 A We had subcontractors who would drive around  
17 camp and pick up their trash and bring it to the pit, the  
18 burn pit.

19 Q Where was the burn pit located at Camp Delta?

20 A We had -- it was an old air force base and it  
21 was located at the end of an air strip approximately three  
22 miles from the LSA.

23 Q And can you just provide us with a physical  
24 description of what the pit looked like?

25 A The pit was a triangle-shaped piece of ground

1 that had a pit about 400 feet wide and maybe 50 feet deep  
2 and it sloped into the ground from the top of the burn  
3 pit.

4 Q Were there any structures or facilities there at  
5 the burn pit or next to the burn pit?

6 A The only structures that were there were some  
7 bombed-out Iraqi pilot hosing and a guard tower and our  
8 hut.

9 Q And tell me about your hut. Where was that in  
10 relation to the burn pit?

11 A We had approximately a eighty to a hundred-foot  
12 fence and it had a gate in it and it was right beside that  
13 gate.

14 Q The hut was?

15 A The hut was. Yes.

16 Q And the fence and the gate, were those on one  
17 side of the burn pit?

18 A They were on what I call the front side of the  
19 pit. Yes.

20 Q And what was on the other sides of the burn pit?

21 A Nothing.

22 Q Was there a fence or gate or anything?

23 A No fence. No gate.

24 Q So was that gate -- did it have a lock?

25 A Yes, it did.

1 Q And did you have the key for that lock?

2 A I did have the key.

3 Q In your capacity running the burn pit at Camp  
4 Delta, how many days a week were you physically at the  
5 burn pit?

6 A Seven.

7 Q And did the burn pit burn on a daily basis?

8 A Every day.

9 Q What were the hours of operation?

10 A When I got there, I believe the hours were 7 to  
11 7, but I changed them to 6 to 6.

12 Q You changed them to 6 to 6?

13 A Yes.

14 Q And were those generally KBR's hours?

15 A As a rule, yes.

16 Q Can you describe what you did from day to day  
17 when you were running the burn pit?

18 A I would get up in the morning, go to DFAC and  
19 eat, go to our security gate, pick up my HCNS as they  
20 cleared security and I would drive to the burn pit. We  
21 would start work -- change our clothes, start working.  
22 Worked 12 hours. We would wait for the trash truck to  
23 come. Open the gate. Kind of scan the truck for  
24 anything. Let them in. Dump the trash. Look for  
25 ammunition and explosives and burn.

1 Q Let's break some of that down. So when the  
2 trash truck came to the gate, what did you all do?

3 A Me or my lead HCN, Omar, would scan the cab of  
4 the truck for anything that might have got picked up that  
5 they shouldn't have in their truck, electronics, anything  
6 that could be used against the warrior.

7 Q Anything that could be used, I'm sorry, against  
8 the warriors you said?

9 A Yes.

10 Q And so once you did that scan, that was just a  
11 visual scan of what was in the truck. Is that right?

12 A Just a visual scan.

13 Q And then what happened next?

14 A I went and unlocked the gate, let the truck in.  
15 They would go down and again when they got to the gate, I  
16 would scan to make sure they didn't take nothing out of  
17 what they had just dumped that they shouldn't have.

18 Q That the individuals who were dumping didn't  
19 take -- that they didn't take something out?

20 A Yes.

21 Q Okay. And was there any sorting that was done?

22 A No sorting. Just look -- kind of kicking around  
23 looking for ammunition and explosives.

24 Q At what point would you all burn the trash that  
25 was dropped in the burn pit?

1           A     Just when I felt that there was enough that the  
2 flames wouldn't be too high and the smoke wouldn't be too  
3 bad.

4           Q     And how did you decide what that was, the flames  
5 weren't too high and the smoke wasn't too bad?

6           A     It depends on what the material was. Paper and  
7 wood would burn much hotter, less smoke. But we burn a  
8 lot of plastic and stuff and we would try to spread it out  
9 to minimize the smoke.

10          Q     Did anyone ever tell you that the flames should  
11 only reach a certain height?

12          A     I heard that today.

13          Q     You hadn't heard that before today?

14          A     Never.

15          Q     Did any members of the military work shoulder to  
16 shoulder with you in the burn pit?

17          A     No.

18          Q     Was your supervisor stationed at the burn pit?

19          A     No.

20          Q     Did the military ever direct your day-to-day  
21 duties with respect to the operation of the burn pit?

22          A     Not to me.

23          Q     Did anyone from the military ever give you  
24 instructions regarding your duties at the burn pit?

25          A     No.

1           Q     Did the hours for burning ever vary based on the  
2 weather?

3           A     No. Not at Camp Delta.

4           Q     What sort of items did you observe being burned  
5 in the burn pit?

6           A     Canvas, plywood, paper, plastic, truck parts,  
7 tires, PVC pipe. Just numerous things.

8           Q     Everything except for ammunition and explosives.  
9 Is that right? Those were the things that you all tried  
10 to take out of the burn pit.

11          A     Yes. We tried, but I know ammunition got  
12 through because we had sporadic rounds going off.

13          Q     Let me ask you about some specific items and you  
14 can tell me if you saw any of these things in the burn pit  
15 at Camp Delta. Okay?

16          A     Okay.

17          Q     Aerosol cans?

18          A     I seen them and burn them.

19          Q     Paints?

20          A     I seen it and burn it.

21          Q     Fuel?

22          A     I used fuel to start the fire.

23          Q     Chemicals?

24          A     Yes.

25          Q     Ammunition we just talked about?

1           A     Yes. Not purposely.

2           Q     Medical waste?

3           A     Yes.

4           Q     Metal?

5           A     Yes.

6           Q     Batteries?

7           A     Yes.

8           Q     I think you mentioned tires?

9           A     Tires.

10          Q     Coolant?

11          A     Anti-freeze?

12          Q     Yes.

13          A     Yes.

14          Q     Was there a list of prohibited items posted  
15 outside of the burn pit at Delta?

16          A     There was after I left the pit. Not while I was  
17 there.

18          Q     Not while you were working during those 90 days  
19 running the burn pit?

20          A     No.

21          Q     Eventually, did you start sorting items that  
22 were coming into the burn pit?

23          A     Yes. I tried.

24          Q     And what did you try to sort?

25          A     PVC, batteries, tires. We had a lot of -- I

1 don't know the name of it. It was gray pipe, like  
2 plumbing pipe, but it was really black smoke and as well  
3 as plastic bottles.

4 Q And what happened to the items that you sorted?

5 A We would put them in different areas until the  
6 piles got too high.

7 Q And then what happened?

8 A Everything other than the metal. We had a  
9 contractor from outside the wire come in and take the  
10 scrap metal. But everything else, we would -- if it got  
11 too high, we would burn it.

12 Q During the 90 days that you were running the  
13 burn pit at Camp Delta, did the burn pit get inspected?

14 A I recall once of a true inspection. Yes.

15 Q What do you mean by a true inspection?

16 A Where somebody actually asked me questions about  
17 the operation of the pit.

18 Q Okay. And who was it that came to the burn pit  
19 on that occasion?

20 A It was -- I believe he was a second lieutenant  
21 and a specialist.

22 Q What did they ask you?

23 A They asked me for permission to enter the gate,  
24 told me who they were and said that -- about five minutes  
25 later, they come back and said it looked pretty good.

1 Q And that was it?

2 A Well, they asked me about the piles of items we  
3 had that I had started sorting.

4 Q And what did they ask you about that?

5 A They said what do we do with it when it's too  
6 high, what do you do with it when your piles are too big.

7 Q Before that inspection, was there an occasion  
8 that you remember that inspectors came to the burn pit  
9 before that time?

10 A I do now. I did not know they were inspectors  
11 then.

12 Q And who was it that came then?

13 A It was an army officer and a specialist.

14 Q What did they do at that time?

15 A They just kind of looked around a little bit.  
16 Went through the gate and looked around and asked me if I  
17 sorted anything.

18 Q And what did you tell them?

19 A I told them then that I didn't because -- the  
20 only thing I sorted was ammunition and explosives.

21 Q And about how long were they there?

22 A Five to ten minutes.

23 Q Are those the only two occasions that you recall  
24 anyone coming out to the burn pit?

25 A That's all I can recall.

1           Q     You started at Camp Delta in March of 2005. Is  
2     that right?

3           A     Approximately. I stayed in Camp Liberty a long  
4     time because of Ramadan and security concerns and right  
5     now, I just can't remember how long I was at Liberty. It  
6     was a long time.

7           Q     And but do you think that you had started  
8     working at the burn pit by sometime in March?

9           A     I believe I did. Yes.

10          Q     And so you were there for 90 days after that  
11     point. Let's say mid to late March?

12          A     Yes, because I was there I know at least 90 days  
13     and I left in mid June.

14          Q     Okay. And for the 90 days, you were running the  
15     burn pit?

16          A     Yes.

17          Q     Did a time come when you had to -- where you  
18     needed a new burn pit at Camp Delta?

19          A     Yes.

20          Q     And what happened? How did the creation of a  
21     new burn pit come about?

22          A     I put in a work order to put a burn pit beside  
23     the old one because the first one needed dirt over it and  
24     they came out. It was either the next day or the day  
25     after that. They come and buried my first pit and dug a

1 second one and made a new burn with that dirt.

2 Q Who did you put the work order into?

3 A My general foreman.

4 Q And on the work order, did you identify where  
5 you wanted the additional pit to go?

6 A Yes. I thought the best place was right beside  
7 the old one.

8 Q And were there general parameters that you would  
9 follow as to where the new burn pit could go?

10 A Did I know the parameters?

11 Q Right.

12 A No. I mean I told them where I thought the pit  
13 would go, but I -- nobody told me where to put it.

14 Q Okay. Were there roads that were around the  
15 burn pit area?

16 A Yes.

17 Q And did those service kind of general kind of  
18 points within which you could put the new burn pit?

19 A Yes.

20 Q But other than that, there was no additional  
21 direction in terms of where the new burn pit could go?

22 A No.

23 Q And you said that they would -- someone came and  
24 dug a new pit. Who was that?

25 A Our M.A.G. folks, equipment operators. And I

1 also believe that there was a subcontractor there because  
2 we didn't have a loader and they did.

3 Q And what did they do?

4 A They buried the pit that was full and dug  
5 another one and made a burn out of that soil.

6 Q And was that new burn pit operated in the same  
7 way that you ran the old burn pit?

8 A Exactly.

9 Q Were you allowed to run the burn pit according  
10 to your own discretion?

11 A Yes.

12 Q Were you required to keep track of what was  
13 burned in the burn pit at Delta?

14 A Not what was burned. I had to keep track if I  
15 found any ammunition or explosives and how many loads came  
16 into the burn pit that day.

17 Q And how did you keep track of that?

18 A We had a piece of paper with a load count and  
19 any ammunition that we found or explosives.

20 Q Now at some point did you go to another camp?

21 A Yes, I did.

22 Q And what camp was that?

23 A Camp Echo at Diwaniya.

24 Q I'm sorry?

25 A Diwaniya.

1 Q Did you run the burn pit at Camp Echo?

2 A I did not.

3 Q Were you asked to go to the burn pit on any  
4 occasions?

5 A Yes.

6 Q How often did you go to the actual burn pit?

7 A I went there twice. I drove by it every day,  
8 but I went there twice.

9 Q Did you observe the materials that were in the  
10 burn pit there at Camp Echo?

11 A Yes, I did.

12 Q And what did you see being burned at Camp Echo?

13 A The same things I seen at Delta.

14 Q Batteries?

15 A Tires.

16 Q Paint?

17 A Paper, plywood, paint. Everything.

18 MS. SMITH: I think that's it, Mr. Robbins.

19 Thank you.

20 THE WITNESS: Thank you.

21 THE COURT: Cross?

22 MR. JOHNSON: Yes, Your Honor. Thank you.

23 CROSS-EXAMINATION

24 BY MR. JOHNSON:

25 Q Good morning, Mr. Robbins. How are you?

1           A     Good. How are you?

2           Q     Mr. Robbins, I'm just going to clarify as we did  
3 during your deposition some of the questions that you were  
4 just asked. I'd like to start just to make sure I have  
5 the timeline right. So you spent 90 days working at the  
6 Al Kut or Camp Delta burn pit. Is that right?

7           A     I did.

8           Q     Okay. And that was in 2005?

9           A     2005.

10          Q     And then when you went to FOB Echo, your next  
11 base, a year later, you saw the burn pit, but you did not  
12 work there. Is that right?

13          A     I did not work there.

14          Q     Okay. So let's focus first then on Al Kut and  
15 the time that you operated the burn pit for 90 days.  
16 okay?

17          A     Okay.

18          Q     All right. So first, as a general description,  
19 the burn pit at Al Kut was about six miles away from the  
20 main camp. Correct?

21          A     It may have not been that far, but it was a long  
22 distance. To say miles, I guess I shouldn't have said  
23 that. I don't know the mileage.

24          Q     So you do remember that you testified that it  
25 was six miles --

1 A Yes, I do.

2 Q Okay. And you don't -- nothing has happened  
3 between your deposition and today to make you think that  
4 that's incorrect. Right?

5 A Nothing has happened.

6 Q No one lived out in that part of Al Kut where  
7 the burn pit was. Right? It was sort of an empty old  
8 part of the base?

9 A It was an empty part. Yes.

10 Q Old bombed-out Iraqi buildings I believe.

11 A And a guard tower.

12 Q And besides the guard tower, there were no other  
13 facilities in that part of the base where the burn pit  
14 was. Right?

15 A None.

16 Q Now you mentioned the location of the new burn  
17 pit. I want to talk about that. I believe you said that  
18 nobody told you where to put the new burn pit at Al Kut;  
19 is that correct, just now during your testimony?

20 A I did say that.

21 Q Okay. But in fact, it was your KBR supervisor,  
22 the camp manager who came to you and talked to you about  
23 locating the new burn pit. Isn't that right?

24 A My general foreman when I told him where I  
25 wanted it, my camp manager then said it was okay through a

1 work order.

2 Q Well, in fact, he told you that he wanted the  
3 burn pit to be as far away from the camp as possible.  
4 Right?

5 A I couldn't move it because of the shape of  
6 the -- where the roads were in relation to the property  
7 where the burn pit was. I mean I couldn't move it across  
8 the road. No.

9 Q Right. Let me just take a step back and make  
10 sure I understand the process. So it was your general  
11 foreman who approached you about expanding or building a  
12 new burn pit. Right?

13 A I told him I needed a new one.

14 Q And he told you that it needed to be built as  
15 far from the camp as possible. Right?

16 A I don't recall ever being told -- I mean I  
17 couldn't -- the physical location was right beside the old  
18 one. I couldn't move it three miles. No.

19 Q Okay. So maybe you're just answering my  
20 question another way. So you had to build this new burn  
21 pit next to the existing burn pit?

22 A Yes.

23 Q You couldn't put it somewhere else on the base?

24 A No.

25 Q You said, for example, you couldn't move it

1 three miles somewhere else and put it next to the DFAC?

2 A No.

3 Q So the new burn pit you built was immediately  
4 adjacent to the old burn pit?

5 A Yes.

6 Q At a constrained area I believe you testified a  
7 half mile by half mile area next to the old burn pit where  
8 you're going to build the new burn pit. Right?

9 A That's close.

10 Q There was a road that was there and you weren't  
11 allowed to build the new burn pit on the other side of  
12 that road. Right?

13 A Exactly. There was two existing roads.

14 Q So you had this area, this area adjacent to the  
15 old burn pit where you had authorization to construct a  
16 new or adjacent burn pit. Right?

17 A Yes.

18 Q Now this new burn pit, this came towards the end  
19 of your time at Al Kut. Right? It was about 90 days sort  
20 of as you were wrapping up your time there?

21 A I would say every bit of 80. Yes.

22 Q Other than the discussion we just mentioned  
23 where you had a conversation with your general foreman  
24 about the burn pit, you didn't have any other discussions  
25 with KBR personnel about locating this new burn pit.

1 Correct?

2 A I did.

3 Q Okay. who did you have those conversations  
4 with?

5 A With our M.A.G. people who were the operators  
6 and the subcontractor who operated the loader. And the  
7 camp manager and assistant manager knew because they  
8 signed the work order.

9 Q So let's break that down. So the M.A.G. folks,  
10 those are the heavy mechanical people who actually came  
11 out and built the burn pit. Correct?

12 A Yes.

13 Q And you had conversations with them. Right?

14 A Yes.

15 Q Your assistant camp manager and your camp  
16 manager were your KBR supervisors. Is that right?

17 A They were. Above my immediate supervisor.

18 Q So in the course of building this adjacent burn  
19 pit, did you ever have any conversations with DCMA about  
20 where that burn pit would be located?

21 A At that point in time, I didn't even know what a  
22 DCMA was.

23 Q So no?

24 A No.

25 Q And you did not have any conversations with the

1 military about where they wanted you to locate this  
2 adjacent burn pit?

3 A None.

4 Q And you didn't see any contract documents that  
5 discussed where this new burn pit should be located.  
6 Right?

7 A None.

8 Q For example, an administrative change letter?

9 A No.

10 Q Or a letter of technical direction?

11 A No.

12 Q Okay. You're smiling a little bit?

13 A I didn't even know what that stuff meant then.

14 Q Okay. Fair enough. Are you aware of who in  
15 your KBR chain of command might have been having  
16 conversations with DCMA and the military about this burn  
17 pit?

18 A I have no idea.

19 Q Okay. So you don't know one way or the other?

20 A I don't know.

21 Q Now you recall making the general statement in  
22 one of your declarations that KBR had the authority to  
23 locate a burn pit. Do you remember that?

24 A Yes.

25 Q Okay. Just to be clear about what you said when

1 you meant that, your only reference point for that is the  
2 location of its adjacent burn pit that we've just  
3 discussed. Right?

4 A Yes. That area between the roads and the wire.

5 Q Right. You don't have any contract expertise or  
6 other experiences that support that conclusion?

7 A Absolutely none.

8 Q Right. So when you say KBR had the authority,  
9 it's based on everything you and I have just discussed  
10 here in this courtroom?

11 A Yes.

12 Q Okay. Now, Mr. Robbins, I'm going to move on a  
13 little bit, but stay at Al Kut at the burn pit. All  
14 right? So we're going to talk a little bit about some of  
15 the prohibited items and things that were burning in the  
16 burn pit. Some of the things that you mentioned were  
17 plastic, car parts and medical waste. Is that right?

18 A Yes.

19 Q Okay. Now I don't believe you've stated it  
20 today, but you've stated it in the past that you believe  
21 that those were violations. Do you remember using that  
22 word?

23 A Yes.

24 Q But you've never read the contract or a contract  
25 document that tells you what KBR is or is not allowed to

1 burn in burn pits. Right?

2 A I'm not sure that I meant violations. I knew it  
3 was wrong what we were doing. I'm not a law guy. So to  
4 say that we were committing a violation, I couldn't say  
5 that.

6 Q Okay. That's absolutely a fair distinction. So  
7 you don't mean a violation of contract. You just mean you  
8 felt it was wrong?

9 A I knew it was wrong.

10 Q Right. And will drill down on that a little  
11 bit, but I appreciate that distinction.

12 Now one of the things that you talked about was  
13 medical waste being burned in the burn pit. Do you  
14 remember talking about that?

15 A Yes, I do.

16 Q Now there were military medics who were bringing  
17 that medical waste to the burn pit. Right?

18 A Yes.

19 Q KBR was not bringing the military's medical  
20 waste to the burn pit at Al Kut?

21 A They were not.

22 Q And in fact at a point in time I believe about  
23 sixty days after you had been operating the Al Kut burn  
24 pit, you instructed the military medics not to bring their  
25 waste to your burn pit anymore. Do you remember that?

1 A There was an incident.

2 Q But despite you telling the military not to  
3 bring waste to your burn pit, they kept bringing it  
4 because they brought it at night. Is that right?

5 A Yes.

6 Q And again, so that was the military bringing  
7 their waste to the burn pit you were operating at Al Kut?

8 A Yes.

9 Q And you base that conclusion not on actually  
10 seeing the military medics dropping that waste off in the  
11 burn pit, but it's based on the fact that you saw bags in  
12 the burn pit when you showed up in the morning. Right?

13 A Yes.

14 Q And you didn't know where those -- you didn't  
15 see those bags get dropped off?

16 A I've never physically seen it. No.

17 Q Right. You assumed that they were medical waste  
18 bags because you saw medical trucks. Right?

19 A When I got done working in the evening, I would  
20 run and I would run towards the burn pit, not all the way,  
21 but that's the way my route was and I seen medical  
22 vehicles coming from that direction.

23 Q Military medical vehicles?

24 A Military.

25 Q Those trash bags that you saw in the morning,

1 you didn't go and open them to confirm what they were --

2 A I did not.

3 Q Now you also testified about water bottles. Do  
4 you remember that?

5 A Yes. Yes.

6 Q And you said that the smoke from burning water  
7 bottles was darker and different than burning other items.  
8 Is that right?

9 A Burning plastic was a much nastier smoke. Yes.

10 Q So plastic more generally. Not just bottles,  
11 but plastic --

12 A Plastic.

13 Q Okay. Now for the first sixty of the ninety  
14 days you were operating the Al Kut burn pit, you were  
15 burning water bottles within the burn pit with everything  
16 else. Right?

17 A Yes.

18 Q And then it was at that 60-day mark when you  
19 decided that you shouldn't be burning water bottles  
20 anymore?

21 A I probably decided before that, but that's when  
22 I tried to make a stand.

23 Q That's when you started to actually sort or  
24 segregate?

25 A Yes.

1           Q     So during your first sixty days, the military  
2 came to the burn pit. Right?

3           A     The military came?

4           Q     During that first sixty days when you were  
5 operating the burn pit, the military came out to your burn  
6 pit?

7           A     I'm not sure I know what you mean.

8           Q     Let's talk about how the different instances  
9 were that happened.

10          A     Okay.

11          Q     All right. I know you said that DCMA only came  
12 out to inspect you once and I believe the phrase you used  
13 was only one true inspection. But you testified  
14 previously that DCMA actually came to observe the burn pit  
15 three to four times during your ninety days of operating  
16 the burn pit. Right?

17          A     I didn't know what a DCMA was then.

18          Q     Right. Do you recall testifying that they came  
19 to visit the burn pit three or four times?

20          A     Military inspectors. I didn't know if they were  
21 DCMA or who they were.

22          Q     Okay. So some form of inspector came to your  
23 burn pit to inspect it three or four times during the  
24 ninety days you were operating the Al Kut burn pit.  
25 Right?

1           A     I may have said that. But right now, all I can  
2 remember is three in -- very vividly.

3           Q     Okay. So you remember three distinctly?

4           A     I think so. Yes.

5           Q     And then the one that you called the true  
6 inspection when you actually spoke with the inspectors as  
7 opposed to them just doing whatever else they were doing.  
8 Is that right?

9           A     I spoke with them. Yes.

10          Q     And in addition to the inspectors who came to  
11 the burn pit, you also just testified that the military,  
12 the medics, for example, were actually coming and dumping  
13 their own waste in the burn pit. Right?

14          A     Yes.

15          Q     And during the first sixty days they were doing  
16 that during the day. Right? They didn't do it at night  
17 until you told them they couldn't come back?

18          A     Right.

19          Q     Okay. So there's at least two reference points  
20 for the military being at your burn pit during the first  
21 sixty days and seeing what you were doing. Right?

22          A     Yes.

23          Q     And in addition to the military observing or  
24 DCMA observing what you were doing, your KBR supervisors  
25 came out occasionally and saw what you were doing as well.

1 Right?

2 A No.

3 Q During that first sixty days, did anybody tell  
4 you to stop burning plastic?

5 A I was told by upper management through my  
6 general labor foreman not to burn plastic on a certain day  
7 and to go out at night and burn it.

8 Q We'll talk about that night bit. Other than  
9 what you just described, nobody told you to stop burning  
10 plastic. Right?

11 A No.

12 Q DCMA never approached you and told you to stop  
13 burning plastic?

14 A No.

15 Q The military never approached you and told you  
16 to stop burning plastic?

17 A No.

18 Q You didn't read a contract document that told  
19 you you shouldn't be burning it. Right?

20 A I did not.

21 Q And as you just testified and as you testified  
22 previously, you believed it was a violation because you  
23 knew it in your head. Right?

24 A Yes. And I had an incidence where a guard come  
25 out of the guard tower and threatened because the smoke

1 was going towards the tower.

2 Q Right. There was some Ukrainian guards who work  
3 next to the burn pit and they didn't like the smoke.

4 Right?

5 A Yes.

6 Q And that's what you're referring to?

7 A Yes.

8 Q So based on the nature of the smoke after the  
9 first 60 days, you decided you want to segregate and you  
10 started segregating out the water bottles among some other  
11 items. Right?

12 A I asked. I did not decide. I asked.

13 Q But then you started doing it?

14 A Yes.

15 Q Okay.

16 A I was granted permission.

17 Q From KBR?

18 A From KBR.

19 Q Right. You don't know if the military or DCMA  
20 was involved in this?

21 A No clue.

22 Q But of course, there was no where for that trash  
23 to go. Right? There was no where for the water bottles  
24 to go. There was no recycling, for example, at Al Kut?

25 A No.

1 Q There were no incinerators at Al Kut?

2 A None.

3 Q There were no landfills at Al Kut?

4 A Not that I was aware of.

5 Q So after a while, you've been stacking up these  
6 bottles and something has to happen with them. Right?

7 A You say landfill. I actually seen dirt being  
8 put into an old burn pit. So if that's a landfill, then I  
9 guess I did know there was a landfill there.

10 Q Okay. The sorting you were doing, right, taking  
11 all these water bottles and other things that shouldn't be  
12 burned, those didn't go to a landfill. Right?

13 A No.

14 Q Right. Because ultimately, what happened once  
15 they built up is you burned them?

16 A Yes.

17 Q And you burned them at night?

18 A I had on a couple of occasions. Yes.

19 Q And burned them at night because you thought  
20 that burning those items was some sort of -- not a  
21 contract violation, but something that shouldn't be done?

22 A No. Somebody above me told me when to do it at  
23 night. Not me.

24 Q Somebody in KBR?

25 A Somebody in KBR.

1           Q     But again, for those first sixty days when you  
2     were burning those same items, those same bottles during  
3     the day and they were producing smoke, nobody from the  
4     military, nobody from DCMA ever told you to stop burning  
5     water bottles. Right?

6           A     Right.

7           Q     And you were the one who approached your KBR  
8     bosses and told them you thought it was a problem to burn  
9     water bottles?

10          A     Yes.

11          Q     Now even once you started burning water bottles  
12     at night, did DCMA or the military ever tell you to stop  
13     doing what you were doing?

14          A     No.

15          Q     And as you sit here, you actually don't know if  
16     burning water bottles at night is a violation of any  
17     contract document. Right?

18          A     I do not know.

19          Q     You just did it at night because you were  
20     worried about the smoke?

21          A     I was told to do it at night on a couple of  
22     occasions.

23          Q     Now we hit on this a little bit, but let's shift  
24     and let's talk about DCMA. So your testimony today is  
25     that DCMA inspected you three times in ninety days.

1 Right?

2 A That is not my testimony. I didn't know what a  
3 DCMA was. So I don't know if they inspected me or not.

4 Q Okay. Who were the people that came to the burn  
5 pit to inspect you three times?

6 A A lieutenant and a specialist.

7 Q Okay. So people in military uniforms?

8 A Yes.

9 Q You don't know who they were?

10 A No clue.

11 Q But you do know they were conducting an  
12 inspection. They were looking at the burn pit. They were  
13 asking questions.

14 A Yes.

15 Q Now on one of the three occasions, they spoke to  
16 you?

17 A Yes.

18 Q Right. Okay. You also observed some civilians  
19 come and observe the burn pit, but you don't know who they  
20 were. Right?

21 A I do not know who they were.

22 Q And those civilians came out to the burn pit and  
23 observed what was happening four or five different times?

24 A Yeah. Probably.

25 Q And as we've already talked about, the military

1 was also coming out to the burn pit to dump waste. Right?

2 A The military was what?

3 Q Coming out to the burn pit to dump waste?

4 A Yes.

5 Q Sometimes when you were there, sometimes when  
6 you weren't there.

7 A Right. Exactly.

8 Q And you never saw any documents from DCMA about  
9 your performance at the burn pit. Right?

10 A No.

11 Q You didn't sit on award fee evaluation boards?

12 A I did not.

13 Q Did you sit on any performance evaluation  
14 boards?

15 A I did not.

16 Q Okay. So do you know how DCMA evaluated your  
17 operation of the burn pit for your ninety days at Al Kut?

18 A I have absolutely no way of knowing.

19 Q Now as far as the process -- taking a step back  
20 to think about how you located the burn pit. If you  
21 wanted to do something, you testified about this earlier,  
22 like if you wanted to build a hut, you had to submit a  
23 work order. Right?

24 A Yes.

25 Q So certain projects required authorization that

1 you passed up your chain of command. Right?

2 A Yes.

3 Q And KBR could approve certain things or DCMA and  
4 the military could approve certain things?

5 A I don't know about -- we didn't have a DCMA in  
6 our camp.

7 Q Okay. So you don't know how the process worked  
8 when you requested --

9 A Exactly.

10 Q Fair enough.

11 MR. JOHNSON: Okay. Thank you, Mr. Robbins. I  
12 don't have any further questions.

13 THE WITNESS: You're welcome.

14 THE COURT: Redirect?

15 MS. SMITH: Just a couple.

16 REDIRECT EXAMINATION

17 BY MS. SMITH:

18 Q You just discussed with counsel for KBR the  
19 military coming to the burn pit to dump waste?

20 A Yes.

21 Q What military was coming to the burn pit to dump  
22 waste? Where were they from?

23 A The Ukrainian Hospital.

24 Q They were Ukrainian military?

25 A Yes.

1           Q     And was that the only military that you ever saw  
2     to come to the burn pit to dump waste?

3           A     Yes.

4           Q     And counsel for KBR made a point that KBR didn't  
5     bring the medical waste to the burn pit. But KBR did burn  
6     it at the burn pit. Correct?

7           A     Yes, I did burn medical waste.

8           MS. SMITH: That's all I've got. Thank you.

9           THE WITNESS: You're welcome.

10          THE COURT: You may step down, sir. Thank you  
11     very much.

12          MS. SALZBERG: Your Honor, you heard from Mr.  
13     Baker and Mr. Ledlie about how KBR agreed to abide by a  
14     contract requirement that required written permission from  
15     an ACO to a contracting officer to use a burn pit at all  
16     and even then impose standards that restricted what could  
17     be burned. And one thing we wanted to draw your attention  
18     to was testimony from David Palmer who was a contracts  
19     manager, a theater contracts manager for KBR during the  
20     2004 to 2009 timeframe. We have a slide about that.

21          THE COURT: Are you going to call him as a  
22     witness?

23          MS. SALZBERG: No. We have a demonstrative  
24     slide and also a copy of the deposition transcript pages  
25     for you.

1 THE COURT: All right.

2 MS. SALZBERG: Can I hand those out?

3 THE COURT: You have to speak up. I can't hear  
4 you, ma'am.

5 MS. SALZBERG: Your Honor, could I hand up  
6 copies of a slide and the deposition transcript pages  
7 behind it?

8 THE COURT: Yes.

9 MS. SALZBERG: One of the things that Mr. Palmer  
10 was asked was "When you were KBR's theater contract  
11 administrator, did you ever receive any letter of  
12 technical direction or other form of written permission  
13 for KBR to surface burn paint?"

14 He said, "paint? well, no."

15 "Question: well, if the military wanted to give  
16 permission to KBR to depart from the terms of the contract  
17 that prohibited burning items, what form of contract  
18 direction would that come through?

19 Answer: It would be an LOTD.

20 Question: Did KBR ever receive a letter of  
21 technical direction or any other form of contract  
22 direction allowing KBR to surface burn batteries?

23 Answer: No."

24 And we heard yesterday from Commander Hersh that  
25 no, batteries were not something that could be burned.

1 That should have gone to the HAZMAT area.

2 Similarly, "did KBR ever receive a letter of  
3 technical direction or any other form of contract  
4 modification that permitted KBR to burn solvents?"

5 He says "no, that's another thing that would go  
6 to the hazardous waste."

7 "Question: Did KBR ever receive any letter of  
8 technical direction or other contract direction that gave  
9 KBR permission to burn chemicals in surface burn pits?

10 Answer: No."

11 We have two more.

12 "Question: Did KBR ever receive a letter of  
13 technical direction or any other form of contract  
14 direction that permitted KBR to burn hydraulic fluids in  
15 surface burn pits?"

16 Once again, "no, that would have been a  
17 hazardous waste collection point."

18 "Question: Did KBR ever receive a letter of  
19 technical direction or any other form of contract  
20 direction giving KBR permission to surface burn petroleum  
21 products?

22 Answer: No. Again, hazardous waste collection  
23 point."

24 Then just two more examples for Your Honor.

25 "Question: Did KBR ever get a letter of

1 direction or any other form of government direction that  
2 allowed KBR to surface burn pesticides?

3 Answer: No.

4 "Did KBR ever receive a letter of technical  
5 direction or any other form of government directive that  
6 gave KBR permission to surpass burn rubber?

7 He says "rubber, no."

8 And you heard from Mr. Baker earlier about tires  
9 being one of the things.

10 MR. RAZI: Your Honor, could we be heard briefly  
11 in response to that?

12 THE COURT: Let me ask you a question. You've  
13 given me an excerpt from the deposition that begins on  
14 page 127. So you're assuming I know who he is. Who is  
15 he?

16 MS. SALZBERG: Mr. Palmer was a theater  
17 contracts manager for KBR. I apologize.

18 THE COURT: All right.

19 MR. RAZI: Your Honor, may I -- can I just make  
20 a brief comment about that?

21 THE COURT: Yes, you may.

22 MR. RAZI: We weren't aware until just now that  
23 plaintiffs intended to call Mr. Palmer by deposition, but,  
24 you know, what's done is done.

25 THE COURT: Didn't they give a list of

1 deposition excerpts they were intending to rely on?

2 MR. RAZI: They gave us a list of the witnesses  
3 last night that they intended to present today and I don't  
4 think he was on it.

5 THE COURT: No. My question was from the  
6 pretrial. Did we not have a list of deposition excerpts?

7 MR. RAZI: There may well have been. My only  
8 point is we've briefed and submitted to the court other  
9 excerpts from Mr. Palmer's testimony and Mr. Palmer's  
10 testimony supports KBR's position that there's no  
11 jurisdiction, that these cases are preempt and we would  
12 just commend to the court --

13 THE COURT: Is that attached to your memo?

14 MR. RAZI: Yes, Your Honor. We'll just commend  
15 the full --

16 THE COURT: I'll make sure we cross-check that.

17 MR. RAZI: Thank you.

18 THE COURT: Thank you. All right. Next?

19 MR. BAKER: Good morning again, Your Honor. I  
20 mentioned in the opening that we would discuss KBR's  
21 paragraph 23, facts in some more detail. And, of course,  
22 paragraph 23 of the defendant's facts is the paragraph on  
23 which KBR principally relies upon for the proposition that  
24 the military directed KBR to use burn pits.

25 Now the witnesses that we've heard over the past

1 day and a half have repeatedly said the contract documents  
2 control. And yet, the government witnesses on which KBR  
3 relies upon for this paragraph 23 have little to no  
4 knowledge of KBR's contractual tasking with respect to  
5 waste. So we've already discussed a number of these  
6 already. So I'm not going to repeat those, but I'd like  
7 to go through a couple of the ones that we have not  
8 addressed yet.

9 THE COURT: Do I have this slide yet?

10 MR. BAKER: I'm going to bring it up.

11 THE COURT: Okay. Thank you.

12 MR. BAKER: So you've heard from General Vines.  
13 Of course, General Sanchez. Dr. Postlewaite was here  
14 yesterday. Colonel -- Mr. Vincent. Lieutenant Colonel  
15 Hall I discussed in the opening yesterday. So I won't  
16 repeat that one. And the Loehr letter at the bottom, Mr.  
17 Ledlie already discussed.

18 Let's turn first to Damon Walsh. And Colonel  
19 Walsh was the commander of DCMA, Northern Iraq and deputy  
20 commander for DCMA, Iraq, 2003-2004. And here's what he  
21 has to say about his knowledge of the contractual tasking  
22 to KBR.

23 "Question: I have a corollary question. Do you  
24 recall any specific instance in which you were informed  
25 that KBR was authorized to use a burn pit as the default

1 method of waste disposal at a site in Iraq?

2 Answer: No.

3 Question: Did you ever see written authority  
4 expressly authorizing KBR to use burn pits in Iraq?

5 Answer: No."

6 Later he's asked, "you are not a technical  
7 expert in waste management?

8 Answer: I'm a pig looking at a wrist watch when  
9 it comes to any technical issues concerning waste  
10 management.

11 Question: Okay. You don't have any knowledge  
12 as to what the army regulations are about the steps you  
13 need to take before you employee" -- actually, in the  
14 transcript it says employee, but I believe it should be  
15 employ -- "open surface burning on?

16 Answer: That is correct. I do not have any  
17 knowledge about that."

18 So that's Mr. Colonel Walsh. That's what he has  
19 to say about the contractual documents.

20 Next, you have Mr. James Loehr. He's the  
21 division -- he's the division chief for LOGCAP III from  
22 2004 to 2009 and was the Director of Contracting at Rock  
23 Island from 2009 to 2010. Let's see what he knows about  
24 the contractual documents vis-a-vis waste management.

25 "Question: Do you know who made the decision to

1 utilize burn pits as a method of waste disposal in Iraq  
2 and Afghanistan?

3 Answer: No, I do not.

4 Question: Do you know whether that's a decision  
5 made by a government person versus a contractor like KBR?

6 Answer: No, I don't know. No."

7 Yet, KBR relies upon this witness for the  
8 proposition that the government directed KBR to use a burn  
9 pit across the board, no less.

10 The next witness is David Bennett and he was an  
11 ACO, an Administrative Contracting Officer at the H-sites  
12 in Iraq in 2006.

13 He's asked: "Do you remember any specific terms  
14 of the task orders or statements of work that dealt with  
15 waste management at the H-sites?

16 Answer: No. I don't remember any specific  
17 terms.

18 Question: And would you have any knowledge for  
19 waste management services under LOGCAP outside of the  
20 H-sites?

21 Answer: No, I wouldn't."

22 Thank you, Your Honor.

23 MR. LEDLIE: Similarly, Your Honor, in paragraph  
24 page 31 of defendant's memorandum, they cite to  
25 Mr. Loehr1, who we just discussed, for the proposition --

1 they quote him for the proposition that "is your testimony  
2 that KBR was in fact integrated with the military in  
3 performing this contract? Answer was yes."

4 And, Your Honor, we'd like to pass up to the  
5 court additional designations for Mr. Loehr1.

6 "Once again, I am defining integrated as they  
7 were there, they were sharing the installations, they were  
8 part of the process -- they were part that, with it and  
9 they had -- in order to properly perform the services that  
10 they were being required, they had to be aware of what was  
11 going on situationally around them, what they had to help  
12 with -- foresee or help or interpret what the government  
13 was necessarily going to need and how to execute the  
14 mission that they had been assigned to. By integrated,  
15 I've never said that they were part of the military. I  
16 mean they were still a succinct organization, succinct  
17 structure in there, but they had to be connected and  
18 integrated in with them so that they were both -- so all  
19 were moving in the same direction."

20 It goes on to say: "I want to draw your  
21 attention specifically to the operation of burn pits.  
22 When KBR operated a burn pit, who did the operation? Was  
23 it KBR or was it the military?

24 Answer: It was KBR.

25 Question: Was there anybody in the military

1 that was working shoulder to shoulder with KBR in these  
2 pits?

3 Answer: Best of my knowledge, no. There  
4 shouldn't have been. There should not have been." That's  
5 Mr. Loehr1.

6 Finally, Your Honor, in page 157 of his  
7 deposition, Mr. Loehr1 said "I mean they were not  
8 integrated from the standpoint -- I mean it depends on how  
9 you define integrated. If you define integrated as KBR as  
10 you had KBR in the military down there operating burn pits  
11 together, the answer is no. If KBR is responsible for  
12 operating the burn pits and this month, there's going to  
13 be a population of 3,000 people and next month 5,000  
14 people integrated from the standpoint that KBR had to be  
15 aware that they were to have two-fifths more waste to be  
16 dealt with, from that standpoint, if that's how you're  
17 defining integration, then my answer is yes."

18 So integration to Mr. Loehr1 is defined by his  
19 definition, Your Honor. And I do have a copy of the  
20 deposition transcript to go along with it.

21 THE COURT: All right.

22 MR. JOHNSON: And, Your Honor, just by way of  
23 brief rebuttal to that, the citation provided by  
24 plaintiff's counsel, which is the same exhibit we provided  
25 the court, not lines 92, 23 to 93, 1 where Mr. Loehr1 does

1 testify that the continuing operation of burn pits was an  
2 army decision that was made after his recollection was  
3 refreshed with a document which post-ceded what Mr.  
4 Ledlie --

5 THE COURT: And that's in your  
6 counter-designations?

7 MR. JOHNSON: It is, Your Honor.

8 THE COURT: Okay. I'll make sure we look at it.  
9 Yes, sir. What's next?

10 MR. BAKER: Next, Your Honor, we're going to  
11 speak briefly about water. Your Honor, there are water  
12 claims in our case and again, when you're evaluating the  
13 plenary control issue, one of the points that we've made  
14 in our brief repeatedly is that this was a what not how  
15 contract. And as we go through the terms of the water  
16 tasking, I think that will be readily apparent.

17 First, if you look at Task Order 59 and the  
18 relevant passage is in or the tasking is in 8.11. Here's  
19 what the task order says. "In accordance with, IAW, in  
20 accordance with applicable army regulations, the  
21 contractor shall provide install, operate and maintain  
22 potable and non-potable water systems to include plumbing,  
23 sewage, gray/black water separation and gray/black water  
24 disposal to facilitate the operation of facilities  
25 provided or operated by the contractor previously

1 designated by the government or as directed by the ACO for  
2 new requirements." Very clear what not how directive.

3 Next, if you'll look at an exemplar from Task  
4 Order 89 and there the relevant provision will be again in  
5 8.11 and I'm not going to read it again, but it's a very  
6 short paragraph and it basically tells what the army  
7 expects. It doesn't say how to do it.

8 Let's look next at Task Order 139 and here  
9 there's a little bit more detail, but not much. It's  
10 still of the what not how variety. Tells that "the  
11 contractor shall provide, install, operate and maintain  
12 potable and non-potable water systems. These systems  
13 shall include plumbing, sewage, gray/black water  
14 separation, gray/black water disposal. All water  
15 production and storage will be in accordance with  
16 applicable regulations and TB Med 577, which is a water  
17 quality standard." So there's a performance standard  
18 incorporated now.

19 Again if you look further down into it, it says  
20 the contractor shall ensure potable water standards comply  
21 with TB Med 577, again in the contract.

22 And if you look at Section 8.115, here's where  
23 "the contractor shall ensure that the water they produce,  
24 store and distribute is purified and tested in accordance  
25 with all applicable D.O.D. and U.S. water purification and

1 preventive medicine regulations and technical manuals."  
2 So KBR is being the one that is required to ensure the  
3 water quality, not Prev Med in the first instance.

4 Next you go to Task Order 159, our next  
5 exemplar. And the tasking again reads very, very  
6 similarly and it says that "all water production and  
7 storage will be in accordance with applicable regulations  
8 and TB Med 577, Tab H." Again a water quality standard.

9 And again we see that the contractor in the  
10 first instance is the party that is responsible for  
11 ensuring that the water is appropriately tested, not the  
12 military. It says "the contractor shall ensure that the  
13 water they produce, store and distribute is purified and  
14 tested in accordance with all applicable D.O.D. and U.S.  
15 Army water purification and preventive medicine  
16 regulations and technical manuals. The contractor shall  
17 be responsible for testing delivered water that they do  
18 not produce or water commingled with municipal water  
19 sources at the water storage and final distribution  
20 sites." Again this is KBR who is being tasked with what  
21 not how. Those are our points on water. Thank you, Your  
22 Honor.

23 THE COURT: All right.

24 MR. LEDLIE: Very briefly, Your Honor. We have  
25 one ACO that we mentioned, Augusta Fehn, that we'll be

1 calling by video.

2 There was a second administrative contract  
3 officer who was deposed in this case, included in our  
4 brief, but we will just give Your Honor a flavor of the  
5 deposition of former ACO David West Bennett. One second,  
6 Your Honor. I will get copies. Apparently, we didn't  
7 have them ready for this particular one.

8 THE COURT: All right. What's the name of the  
9 witness again?

10 MR. LEDLIE: Yes. This is -- his name is David  
11 Bennett, but he went by West. So West Bennett, Your  
12 Honor. He was an Administrative Contract Officer. It's  
13 Exhibit 43 to our brief. And I will be publishing lines  
14 15 through 17 and 19 through 21, Your Honor.

15 Mr. Bennett is being asked about responsibility  
16 for supervising -- I'm just waiting, Your Honor, while we  
17 get it up. But he's been asked about whether as an  
18 Administrative Contract Officer, so part of the  
19 contracting command, "Did you also provide oversight to  
20 the KBR employees to the extent that you were providing a  
21 service that you authorized?

22 His answer was "I don't think my oversight was  
23 specific to employees. It was more general to the  
24 performance of the contract."

25 "Question: Within that structure, did you

1 provide supervision or guidance to KBR as an entity, which  
2 necessarily includes KBR employees?

3 His answer was "I wouldn't call anything I did  
4 supervision. I wouldn't call it -- I wouldn't  
5 characterize it that way. No." Because as an  
6 Administrative Contract Officer, he understood that KBR  
7 was to be -- he was not to manage or supervise or directly  
8 do anything with KBR's personnel. He would coordinate on  
9 performance standards. What not how, Your Honor. West  
10 Bennett.

11 MR. RUSSELL: Your Honor, if I could briefly be  
12 heard in response to that? Mr. Bennett is one in a list  
13 of witnesses that the plaintiffs did not tell us they  
14 would be calling by deposition today.

15 MR. LEDLIE: I need to respond to that, Your  
16 Honor. We had an agreement -- a letter agreement with the  
17 court that you endorsed that said that anything that we  
18 included in our brief, we could use demonstrate exhibits  
19 so long as we restricted ourselves to the page and lines  
20 in our brief.

21 MR. RUSSELL: Mr. Ledlie, let me finish and let  
22 me just cut to the chase, Your Honor. We had  
23 counter-designations that we had prepared if we were told  
24 that they were going to be presented by deposition. We're  
25 happy to provide the Court with those

1 counter-designations.

2 THE COURT: Provide me with the  
3 counter-designations.

4 MR. RUSSELL: We will do that.

5 THE COURT: And then when we hear closing  
6 argument, you can give your position on the significance  
7 or lack thereof of the witness.

8 MR. RUSSELL: We will do that, Your Honor.  
9 Thank you.

10 THE COURT: You were going to play this  
11 testimony?

12 MR. LEDLIE: Of Augusta Fehn. Yes, Your Honor.

13 THE COURT: I'm talking about Bennett.

14 MR. LEDLIE: Oh, no, Your Honor. That was just  
15 that one snippet. But we do have the other ACO that was  
16 deposed in this case, Augusta Fehn's videotape, shortened  
17 videotape deposition which we are ready to begin playing  
18 at this time, Your Honor.

19 THE COURT: Does that include  
20 counter-designations?

21 MR. LEDLIE: At the request of KBR, we had it  
22 cut that way. They requested that they hand theirs up.

23 MR. RUSSELL: Your Honor, we'll have a brief  
24 response after this. We didn't think it was an efficient  
25 use of the time to play more video.

1 THE COURT: All I'm saying is I want to make  
2 sure that for the sake of completeness, whatever you're  
3 playing has enough for the KBR position to come out. If  
4 it doesn't, we need to edit it. That's all.

5 MR. LEDLIE: Okay.

6 THE COURT: Okay. This is another ACO?

7 MR. LEDLIE: Yes, Your Honor. This is Augusta  
8 Fehn. She was a DCMA ACO and the time of her tenure will  
9 be covered in her testimony, Your Honor. For Your Honor's  
10 information, it is a 52-minute video.

11 THE COURT: You're going to play 52 minutes?

12 MR. LEDLIE: Your Honor, as an Administrative  
13 Contract Officer, yes, Your Honor. We think that you need  
14 to see not just the written word, but the answers to the  
15 questions posed.

16 THE COURT: Well, what's the pleasure of the  
17 parties? Do you want to take lunch now or 52 minutes from  
18 now?

19 MR. LEDLIE: We don't have a preference, Your  
20 Honor.

21 MR. JOHNSON: We'll proceed with Augusta Fehn,  
22 Your Honor. Thank you.

23 THE COURT: How do you spell her last name?

24 MR. LEDLIE: Your Honor, it is F-E-H-N. There  
25 are a couple of exhibits that are referenced in the

1 deposition which -- and if it would assist the Court, we  
2 have a copy of the clip sheets of the video, Your Honor.

3 (Video deposition played.)

4 MR. LEDLIE: That concludes the deposition of  
5 ACO Augusta Fehn, Your Honor.

6 THE COURT: All right. What is on tap for the  
7 rest of the day from the plaintiffs?

8 MR. LEDLIE: Your Honor, our original plan was  
9 to call General Volmecke who had a health situation. So  
10 we're not calling him. We have learned that Colonel  
11 Coponis who was our other will call live witness is also  
12 ill. I'm going to be checking on him over the lunch  
13 break.

14 THE COURT: Okay.

15 MR. LEDLIE: If we don't have any  
16 more witnesses, Your Honor, we do have our brief  
17 submissions and I don't know that we'll need to publish  
18 much this afternoon, Your Honor. Thank you.

19 THE COURT: Well, let's recess for an hour and  
20 see how you're doing at -- and we'll resume at quarter of  
21 2.

22 (Luncheon Recess.)

23 AFTERNOON SESSION

24 THE COURT: Okay. What's on tap from the  
25 plaintiffs?

1 MR. LEDLIE: Your Honor, we do have two handouts  
2 that I went over earlier that I didn't have copies of. So  
3 it's an administrative matter.

4 THE COURT: Okay. That will be helpful.

5 MR. LEDLIE: First, this is the slide from David  
6 Bennett and I also have the deposition backup for the  
7 slide that we published for Damon Walsh.

8 THE COURT: Okay. Thank you.

9 MR. LEDLIE: And that concludes the evidence  
10 that the plaintiffs will submit at this hearing, Your  
11 Honor. We are interested in what you have to say.

12 THE COURT: All right. Does the defense want to  
13 offer any rebuttal either through argument on Monday or  
14 through any witnesses or documents today?

15 MR. MATTHEWS: No, Your Honor. You have our  
16 counter-designations and we will wait for closing to  
17 submit arguments.

18 THE COURT: All right. Well, we'll have a nice  
19 robust closing. I wanted to make sure that -- you know,  
20 we got half the Bar Association in this courtroom and  
21 they're all tired and it's Friday. So I'm not going to  
22 try to have you do argument today as I said yesterday.

23 I wanted to get educated more on Monday about  
24 why national defense interests are not closely intertwined  
25 with the military's decisions as to KBR's conduct of its

1 contractual duties. If I understand the testimony and you  
2 all can straighten me out on this on Monday, when KBR was  
3 tasked with waste management services at a particular  
4 location, these contracts which have wonderful language in  
5 them which would be probably only possible to comply with  
6 in California, but it has a lot of wonderful language in  
7 it about complying with various environmental things.

8 The military contracts with these people in most  
9 instances at least as I saw to provide waste management  
10 services. I remember one of the witnesses said that. He  
11 said, well, if I'm going to be tasked to operate the burn  
12 pit at Balad or whatever it is, I'm going to get a  
13 contract that says waste management; it doesn't say burn  
14 pit.

15 And the question I have is while you -- there's  
16 the language that's been given in the arguments about  
17 what, not how. But don't I have to discredit the  
18 testimony of General Sanchez that he arrives in Iraq and  
19 assesses the situation and makes the determination based  
20 upon battlefield exigencies that the only way to dispose  
21 of waste and other materials is either to bury them or  
22 burn them. And that decision that he made was carried out  
23 by his successors and not changed. And in fact it was  
24 defended in communications with Congress. It's not a nice  
25 way to get rid of trash. There's no question about that.

1           But I need to be educated by the plaintiffs as  
2     to why the use of burn pits was not a military judgment.  
3     I need to be helped by the plaintiffs in educating me on  
4     if -- as with the convoy case, you've got a person driving  
5     a truck negligently causing harm, but unless you can say  
6     that it was exclusively and only that person and not a  
7     military involvement, they couldn't recover.

8           So in this case, you've got KBR with these  
9     wonderful agreements that talk about waste management  
10    services that if you read them on their face, clearly even  
11    in California, it would be hard to do all the things that  
12    those contracts say. And I admire the government lawyers  
13    that drew up those agreements. But one size fits all is  
14    not necessarily going to work in assessing liability under  
15    battlefield conditions and so I need a little help on that  
16    type of an issue.

17          The question of integration, I need a little  
18    help on whether that means literally into the strictly  
19    speaking chain of command of the military or does it mean  
20    integrated into the mission of the military. And the  
21    military carries out its mission in a variety of ways. It  
22    can do it with its own personnel or it can do it with its  
23    own personnel joined by contractual personnel.

24          And under the military control factor, there has  
25    been a lot of testimony presented to me as to whether the

1 battlefield commanders have KBR in its chain of command.  
2 So you can go up to somebody and say -- you should say,  
3 sir, yes, sir and how high do I jump, sir, and so forth  
4 doesn't apply to military contract. I understand that.  
5 But for purposes of "control" under the cases, does it  
6 strictly mean only the battlefield commander's control or  
7 does it mean "the military's control" and why would that  
8 not include contracting officers who "control" the conduct  
9 and the contracting and the performance of the contract of  
10 the contractors?

11 If you apply the Al Shimari test, which deals  
12 with being either under actual control or involving  
13 sensitive military judgments I need to be helped as to why  
14 it doesn't satisfy both of those prongs in this case.

15 I do need some more education from both parties  
16 on the -- not as exciting aspect of this case as burn  
17 pits -- but the water question. So I need to make sure  
18 that both sides focus a little more on giving me record  
19 and legal arguments with respect to the water services  
20 that are also at issue in this case.

21 And I need help from the plaintiffs as to why  
22 the language of all these contract documents is at least  
23 in the battlefield context of this case elevating form  
24 over substance because the most important aspect of this  
25 case, the one causing more -- at least from my

1 observation -- more harm and involving more sensitive  
2 questions of ruining people's lungs and causing all kinds  
3 of injuries and damages, I need to have a better  
4 understanding from the plaintiffs as well as from the  
5 defense as to how and why the operation of these burn pits  
6 does not reflect a quintessential military judgment and  
7 whether it conforms with the language of the contracts or  
8 not.

9           It is clear that in the battlefield environment  
10 of this case, there were burn pits all over the place and  
11 that the decision to have burn pits and where to locate  
12 them except under miniscule circumstances was made by the  
13 military. They made the decision on where in the real  
14 estate of that base you could put that burn pit. They  
15 made the decision to use them at least from the record  
16 I've got in front of me. So I need some help from both  
17 sides on going into greater detail on that.

18           If you look at the Saleh case which the Fourth  
19 Circuit embraced, the D.C. Circuit said "during wartime  
20 where a private service contractor is integrated into  
21 combatant activities over which the military retains  
22 command authority, a tort claim arising out of the  
23 contractor's engagement in such activity shall be  
24 preempted."

25           Now the question I have for both sides to look

1 at is, well, what does it mean "integrated into combatant  
2 activities"? Does it literally mean what appears to be  
3 the thrust of the testimony from the plaintiffs' witnesses  
4 that it has to be somebody in the strict chain of military  
5 command of the battlefield commander or does it mean  
6 military authority, which would include contracting  
7 authority? And what does it mean for the Saleh test that  
8 the military retains command authority? I doubt in any  
9 sense of the way that the military did not retain command  
10 authority over all these forward operating bases and so I  
11 need some argument and help on that question.

12 And referring again to Carmichael, one of the  
13 observations of the Eleventh Circuit was that the  
14 plaintiff had not come close to showing that the KBR  
15 employee was the only party to blame and that other  
16 military decisions could have been implicated as well.

17 And the question I would have is you've got a  
18 very clear record demonstrating the military made the  
19 decision to use burn pits and you've also got record  
20 evidence indicating that not all of the operations of all  
21 of the burn pits may have been perfect. That some things  
22 may have been burned that shouldn't have been in some  
23 places on some occasions. One observation I would make is  
24 that's one of the risks you take when you operate burn  
25 pits. That you may have a big truck roll up of a load of

1 trash and unless you get in there and go through every  
2 piece of trash in there, you may not be able to completely  
3 assure people that there's not one or two things going in  
4 that are impure or not proper for being burned.

5 But with the decision of the military being made  
6 to use burn pits, knowing that that carries with it some  
7 risks that things are going to be burned, even the proper  
8 things to be burned that may cause health risks and that  
9 occasionally, somebody may not operate it perfectly  
10 correct, that's a military judgment.

11 Now let's assume that somebody did dump a  
12 Sherman tank into a burn pit on a given day, which may or  
13 may not have caused anybody any harm on that day or some  
14 other day. The question is whether you could say that the  
15 harm being caused to the plaintiffs is only caused by KBR  
16 or is there some joint responsibility, co-responsibility  
17 of the military and KBR for the operation of the burn pit?  
18 I'm not sure how to answer that question at this point.

19 I mean the overall question from the Fourth  
20 Circuit in one aspect of this case is their observation in  
21 which it concluded that "although the evidence shows that  
22 the military exercised some level of oversight over KBR's  
23 burn pit and water treatment activities, we simply need  
24 more evidence to determine whether KBR or the military  
25 chose how to carry out these tasks."

1           And so I need argument based on the factual  
2     record as to what the answer is there. I believe at this  
3     point that the position of the plaintiffs is that it was  
4     KBR's duty under the contract to choose how to carry out  
5     its tasks and the principal task that's challenged is the  
6     decision under a waste management contract to use burn  
7     pits. I wonder out loud whether the language of a  
8     contract can on this record be determinative of that issue  
9     when the factual record indicates, quite clearly, that the  
10    decision at least insofar as carrying out the waste  
11    management duty was made by the military to use burn pits.

12           And that takes me back to the Al Shimari which  
13    made clear that the first Taylor factor requires an  
14    evaluation of whether the military retained actual control  
15    as opposed to merely formal control over the contractor's  
16    performance. Clearly, under the record as developed in  
17    this case before me, if the control issue is directed at  
18    the use of burn pits, why is that not established by the  
19    record in this case as opposed to saying that it was KBR's  
20    decision and it violated its contract?

21           I need some help from the plaintiffs on their  
22    contention that KBR should have been using incinerators as  
23    to how in the record developed before me that would be  
24    feasible when they couldn't get them transported there,  
25    there were fiscal constraints on getting them there. How

1 they could be expected to engage in incineration when  
2 incineration was not an available option under the  
3 battlefield conditions of this case?

4 There are a number of examples that the defense  
5 gives of specific directives given to KBR as to how to  
6 carry out its water services. And I think the question  
7 that needs to be addressed is whether that -- those number  
8 and type of directives that were given would be sufficient  
9 to constitute them controlling the fulfillment of its  
10 contract by KBR.

11 And as I said, that brings me back to the  
12 question I raised before. Does control mean it has to be  
13 control of a strictly speaking military battlefield chain  
14 of command or does control also include command by the  
15 contracting authorities within the military? Is that a  
16 distinction with a difference or without a difference?

17 Those are just some random observations that may  
18 help you focus yourself a little bit for Monday. And as I  
19 said, some things have fallen off my calendar for Monday.  
20 So I can be pretty generous with you in terms of how much  
21 time you take to go forward on Monday. And so in the  
22 absence of anything else, we'll --

23 MR. MATTHEWS: Your Honor, if I may?

24 THE COURT: Go ahead.

25 MR. MATTHEWS: I actually was going to ask that

1 very question. I think we had originally talked about  
2 being done by noon. Are you suggesting it would go beyond  
3 that as needed?

4 THE COURT: It's possible. I said I want to get  
5 this case well argued and I don't want to be just running  
6 a clock. I want to give you all a chance to develop your  
7 record and make your arguments --

8 MR. MATTHEWS: Much appreciated.

9 THE COURT: -- clearer. And that's why -- I  
10 mean I got you down all the way to noon. But if worse  
11 comes to worst, I can go after noon. I've got a 1:00  
12 hearing in a criminal case in which the defendant has  
13 scheduled his guilty plea. So that's going to go away.  
14 So other than being parched with hunger and thirst, I can  
15 give you more than three hours to get this down.

16 MR. MATTHEWS: Your Honor, the only other thing  
17 was to clarify. I think I said that all the counters were  
18 in and what I really meant to say was we would -- whatever  
19 counter-designations are not already in will be in by  
20 Monday.

21 THE COURT: That's right. And you can do the  
22 same thing they did and tell me what they are so I'm fully  
23 aware that we get the full picture.

24 All right. Well, you've been working very hard  
25 for a long, long time in this case. It's time to have a

1 nice weekend of relaxation --

2 (Laughter.)

3 THE COURT: -- preparation for Monday. All  
4 right. We'll see you Monday at 9:00.

5 MR. LEDLIE: The exchange as a part of the  
6 pretrial conference and in this case, page and line  
7 designations. Both sides, affirmatives and counters.  
8 Whatever you're submitting is going to be in response to  
9 the already exchanged page and lines?

10 MR. MATTHEWS: Yes.

11 MR. LEDLIE: That's fine.

12 THE COURT: All right.

13 (Proceedings concluded.)

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CERTIFICATE OF REPORTER

I, Lisa K. Banks, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the hearing in the case of the In Re: KBR, Inc., Burn Pit Litigation, Civil Action Number RWT-09-md-2083, in said court on the 10th day of March, 2017.

I further certify that the foregoing 110 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 11th day of March, 2017.

Lisa K. Banks

Lisa K. Banks  
Official Court Reporter

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**youngest [1]**

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